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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

W.V. PANGBORNE AND CO., INC.,
and J.A. BRUCE PINNEY,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals for the Third Circuit, in conflict with other circuits, is correct in holding that proof of a relevant market is necessary in bid rigging cases and that bidders that otherwise compete with each other but are not selected for a particular bid list are in separate markets as a matter of law?

2. Whether the Court of Appeals for the Third Circuit, in conflict with other circuits, is correct in holding that as a matter of law the use of restricted bidders' lists by targets of a bid rigging conspiracy requires a finding of a separate conspiracy for each target whose bidders' list is not identical to any other target's bidders' list?

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* Pursuant to Rule 21.1(b) of this Court, Petitioners state that the parties to the proceeding in the court whose judgment is sought to be reviewed were: The United States of America (Appellant) and Sargent Electric Co., Lord Electric Co., Inc., W. V. Pangborne and Co., Inc., and J. A. Bruce Pinney (Appellees).

Pursuant to Rule 28.1 of this Court, Petitioner W. V. Pangborne and Co., Inc., further states that it is a wholly owned subsidiary of Fischbach and Moore, Inc. Fischbach and Moore, Inc. is a wholly owned subsidiary of Fischbach Corporation. The only other subsidiary of Fischbach Corporation (other than wholly owned subsidiaries) is Fischbach and Moore of Canada, Ltd. All of the subsidiaries of Fischbach and Moore, Inc. and W. V. Pangborne and Co., Inc. are wholly owned. Fischbach Corporation, Fischbach and Moore, Inc., and W. V. Pangborne and Co., Inc. do not have any affiliates.

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W. V. PANGBORNE AND CO., INC., and
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—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners W. V. Pangborne and Co., Inc. and J. A. Bruce Pinney respectfully pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case, entered on March 14, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is officially reported at 785 F.2d 1123. A copy of the opinion is provided herewith in Appendix A. The opinion of the United States District Court for the Eastern District of Pennsylvania has not been officially reported. A copy of that opinion is provided herewith in Appendix B.

JURISDICTION

The judgment of the Court of Appeals (Appendix D) was dated and entered on March 14, 1986. Petitions for rehearing in banc were denied April 18, 1986. Copies of those opinions are provided herewith in Appendices E through H. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The district court had jurisdiction over this action pursuant to 15 U.S.C. § 1 and 18 U.S.C. § 3231.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioners seek dismissal of their indictment pursuant to the Fifth Amendment of the United States Constitution, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Const., amend. V.

Petitioners were indicted pursuant to Section 1 of the Sherman Act, which provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall

> make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1.

STATEMENT OF THE CASE

Petitioners were twice indicted for bid rigging, and moved to dismiss the second indictment on the ground that it charged the same conspiracy for which jeopardy had already attached. Although the undisputed evidence showed a single overarching conspiracy, the Court of Appeals has announced a novel and erroneous interpretation of the antitrust laws that allows the government to charge petitioners Pangborne and Pinney with multiple conspiracies, in violation of the Double Jeopardy Clause of the Fifth Amendment.

A. How the Conspiracy Operated

In order to assess the validity of the double jeopardy claim, the district court held a four day evidentiary hearing on the issue of number of conspiracies the government could charge. The evidence produced during the double jeopardy hearing showed that in Philadelphia and Pittsburgh there are a handful of very large industrial companies that require major electrical construction work on a regular basis. Those companies ("customers") are United States Steel, Lukens, Inc., Gulf Oil, Sun Oil, and Arco. Those customers put that work out to bid, but limited the number of contractors that were allowed to bid on any particular job. The restricted bidders' lists used on the various jobs were not identical. Each customer changed the make up of its list over time, and often from job to job. The

electrical contractors invited to bid the jobs had no control over the make up of the restricted bidders' lists.

Once a customer selected the contractors to bid a job it invited all of them to a pre-bid meeting to discuss the scope of the work to be bid. At that time each contractor became aware of the identity of all others on the bid list for that particular job. From the early 1970's until the termination of the conspiracy, the majority of the electrical contractors invited to bid these jobs met with each other to allocate the electrical construction work for these customers. Whenever all the bidders on a large job were known to be "cooperators," and one of those bidders wanted to rig the job, there would be a meeting and the bid would be rigged.

The meeting to rig the job would be held at a location that was most convenient for all the cooperating contractors selected to bid the particular job. The contractors would discuss their estimates for the cost of the job, agree on a low estimate, agree on a mark up for overhead and profit to be added to the low estimate, decide who the low bidder would be, and decide the amounts of the higher bids.

All five major customers let contracts for work in the greater Philadelphia area; in addition, U. S. Steel let contracts for work in Western Pennsylvania. Petitioners Pangborne and Pinney bid jobs for all five customers in the Philadelphia area; they did not bid jobs for U. S. Steel in Western Pennsylvania because U. S. Steel invited Fischbach and Moore, Inc., Pangborne's parent company, to bid those jobs from its Pittsburgh district office.

B. How the Government Punished the Conspirators

On July 1, 1983 petitioners Sargent and Lord, together with three other companies (including Pangborne's parent Fischbach and Moore, Inc.) and five individual defendants were charged with violating 15 U.S.C. § 1 by fixing prices on, allocating, and rigging bids on projects at the Western Pennsyl-

vania Works of United States Steel Corporation during the period from about 1974 until 1981. Trial began on February 6, 1984 and on March 7, 1984 the jury returned a verdict of guilty as to all remaining defendants, including Sargent and Lord. Petitioners Sargent and Lord (and Fischbach and Moore, Inc.) were each fined the maximum amount, $1,000,000, plus the costs of prosecution.

On March 8, 1984 petitioners Pangborne and Pinney were charged with violating 15 U.S.C. § 1 by fixing prices on, allocating, and rigging bids on projects at the Philadelphia refinery of the Gulf Oil Company during the period from the late 1970's until about 1982. On June 5, 1984 both Pangborne and Pinney pled *nolo contendere* to the indictment and were sentenced July 19, 1984. Pangborne was fined $175,000; Pinney was fined $50,000 and sentenced to serve 30 days at a community treatment center.

Despite these successful prosecutions the government was not satisfied and continued to pursue petitioners. On July 19, 1984 all four petitioners were charged with violating 15 U.S.C. § 1 by fixing prices on, allocating, and rigging bids on projects at the Fairless Works of United States Steel Corporation during the period from the early 1970's until about 1980.

Petitioners moved to dismiss this indictment on the ground that it twice put them in jeopardy for the same offense in violation of the Fifth Amendment. After a preliminary hearing on November 13, 1984, the district court found that defendants had made a prima facie showing of double jeopardy and ordered that an evidentiary hearing be held on the issue. The court then presided over a four-day evidentiary hearing at which thirteen witnesses testified.

On March 26, 1985 the district court dismissed the indictment. In its opinion (reproduced in Appendix B) the district court carefully analyzed and weighed the evidence presented and concluded:

> The evidence convinces me that there was one general understanding among all the participating electrical contractors which had been in existence for a number of years that bids would be rigged when circumstances permitted regardless of whether the job was at U. S. Steel in Western Pennsylvania, Fairless Hills, Gulf Oil, Arco, Sun Oil or Lukens steel. Bid rigging at each of these facilities did not reflect separate conspiracies but simply separate manifestations of the same unlawful agreement to rig bids wherever and whenever possible.

(App. B at 55a).

The United States appealed the decision of the district court and on March 14, 1986 the Court of Appeals for the Third Circuit, one judge dissenting, reversed, reinstating the indictment. The Court of Appeals held that, in an alleged horizontal price fixing conspiracy, each conspirator must have been an actual or potential competitor with every other conspirator. Because, in the court's view, bid riggers could only conspire with other companies that were on an approved bid list, there could not have been a single conspiracy among the petitioners to rig bids to the five customers. Instead, according to the court below, there was a separate bid rigging conspiracy at each facility.

Judge Adams dissented, concluding that the majority erred in holding "as a matter of law that noncompetitors cannot conspire in restraint of trade" (App. A at 22a). In Judge Adams' view, "the existence of selected bidders' lists does not preclude the conclusion that there is a single conspiracy to restrain trade both under section one of the Sherman Act and under the double jeopardy clause." (App. A at 26a-27a). He observed that "despite the target companies' policy of maintaining selected bidders' lists, all conspirators were *potential* conspirators" (App. A at 28a), and he referred to the district court's explicit fact findings showing that the success of the conspiracy depended upon the continuing agreement of all bid

riggers, including those who were not qualified to bid at particular facilities (App. A at 27a-28a).

All defendants petitioned for a rehearing in banc, which was denied April 18, 1986, by a six-to-five vote. (Appendices E through H).

REASONS FOR GRANTING THE WRIT

A divided panel of the Court of Appeals for the Third Circuit has erroneously concluded that a relevant market is necessary in bid rigging cases and that bidders not selected for a particular bid list must be excluded as a matter of law from the analysis of such cases. This decision, which is in conflict with decisions of several other Circuits, makes it easier for the government to fragment single antitrust conspiracies into multiple prosecutions for the same crime and serves as a dangerous precedent for the abuse of the double jeopardy guarantee of the Fifth Amendment of the Constitution. This is clearly an important issue on which the lower courts need guidance, as evidenced by a two-to-one split by the panel below and a six-to-five vote on the petition for rehearing in banc. Further review is plainly warranted.

A. The Court of Appeals Has Misconstrued the Antitrust Laws

By requiring proof of a "relevant market" in a case involving conduct that is illegal *per se*, and then by restricting that market to sellers on a selected bidders' list, the Court of Appeals for the Third Circuit made two fundamentally incorrect interpretations of the antitrust laws which will have serious repercussions on the rights of individuals and corporations to be free of multiple prosecutions for a single crime.

Bid rigging is a serious crime, and all the defendants in this case have been punished for committing that crime. The crime itself is the conspiracy, or agreement, to fix prices, and such conduct has been classified by this Court as illegal *per se*. "Proof that a combination was formed for the purpose of

fixing prices and that it caused them to be fixed or contributed to that result is proof of the completion of a price-fixing conspiracy under § 1 of the [Sherman] Act." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 (1940). The conspiracy need not be successful; the conspirators need not have the market power to effect the conspiracy; no overt act in furtherance of the conspiracy need be shown. *Id.* at 225, n. 59.

By labeling bid rigging as illegal *per se* this Court made its prosecution sure and simple: prove the agreement and liability attaches. No excuses, explanations, or economic extenuating circumstances will be heard. In his analysis of the *Socony-Vacuum* holding a current commentator concluded: "With no legitimate objective at stake, society sacrifices nothing by condemning a restraint without inquiring into power or effect, even if such an inquiry would ultimately show that the conspirators lacked the power to implement their antisocial scheme." 7 P. Areeda, *Antitrust Law* 411 (1986).

The Third Circuit, however, now holds that even in *per se* cases further inquiry into the definition of the relevant market is required. The Third Circuit's new reading of the law is:

> As in all conspiracy statutes, concert of action is a substantive element, but under governing caselaw more than mere concert of action is required. The illegal object of a Sherman Act conspiracy must be identified in terms of an intended or achieved effect upon commerce in a relevant market, a market not defined by statute.

(App. A at 7a). By citing "governing caselaw" for this proposition, contradicting this Court's formulation of the law in *Socony-Vacuum*, the court below underscored the infirmity of its position, for in fact it cited not a single case in support of its holding.[1]

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1 Judge Adams, in dissent, charitably noted "[t]he lone case cited [but not by the majority] that arguably adopts the position espoused by Judge Gibbons, which is of course crucial to his conclusion, is *United States v. Ashland-Warren, Inc.*, 537 F. Supp. 433, 443, 445 (M.D. Tenn. 1982)." (App. A at 24a). In that case a conviction for road paving bid rigging in Virginia was asserted to require dismissal of an

Having decided that relevant market need be proved in *per se* cases, the Court of Appeals compounded its error by defining "relevant market" in terms which misconstrue the meaning of the doctrine of "potential competition." As noted above, the undisputed evidence in this case is that on any individual bid letting the customer would restrict the bidders on the subject project to three, four, five, or more electrical contractors, and only those contractors could bid for that particular job. The Court of Appeals concluded from that evidence alone that "[t]here is no potential competition between a party not on an approved list of vendors and a party on such a list." (App. A at 13a). Based on that erroneous conclusion, the court then noted that all conspiratorial acts regarding each of the bid rigging targets were not identical, and found that those differences indicated that there were separate conspiracies. Linking those two concepts it found that either the district court applied the incorrect legal standard (by adopting a traditional view of potential competition) or that the court's findings of fact (of an overarching conspiracy) were clearly erroneous.[2]

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indictment for similar activity in Tennessee. The district court noted that only one defendant bid paving jobs in both Virginia and Tennessee. The court also pointed out that asphalt could not in fact be transported more than forty miles from the plant site. In that case the logical holding was that contractors who could not physically compete with each other could not be potential competitors; here just the opposite is the case: the undisputed evidence is that all the defendants in fact competed with each other.

2 In his concurring opinion Judge Stapleton analyzed the evidence in terms of his "experience" that bid riggers are risk averse and would prefer a series of site-by-site conspiracies to an overarching one. He concluded: "The few facts relied upon by the trial court in reaching a contrary conclusion are equally consistent with a finding of multiple conspiracies and, accordingly, do not provide unambiguous evidence of an overarching conspiracy." (App. A at 19a). This requirement of unambiguous evidence of a single conspiracy impermissibly shifts the burden of proof from the government to petitioners. Further, where evidence is "equally consistent" with the findings of the district court those findings cannot be reversed even if the Court of Appeals disagrees with such findings, *Anderson v. City of Bessemer City*, ____ U.S. ____, 105 S.Ct. 1504, 1512 (1985).

By focusing on the variations of the terms of the conspiracy as they existed from victim to victim the Court of Appeals overlooked the factual overlay that gave shape to the entire conspiracy. As to petitioner Pangborne (and, of course, its employee, petitioner Pinney), the undisputed facts are these:[3] In the Philadelphia area there were four major electrical contractors who did most of the bidding to the five major industrial companies that the evidence showed to be victims of conspiracy from the early 1970's to the early 1980's. The four contractors were the Harry F. Ortlip Company ("Ortlip"), The Howard P. Foley Company ("Foley"), Pangborne, and The H. B. Frazer Company ("Frazer").

All four contractors rigged jobs to Gulf Oil.

All four rigged bids to Sun Oil.

Three of the four (Ortlip, Foley, and Pangborne) rigged jobs to U. S. Steel Fairless Works.

Three of the four (Ortlip, Foley, and Pangborne) rigged jobs to Arco.

Three of the four (Ortlip, Pangborne, and Frazer) rigged jobs to Lukens, Inc.

The same individuals attended bid rigging meetings for each of the above contractors for approximately a decade. A decade-long history of cooperation on jobs to these five large customers clearly supports the district court's finding of a single agreement to rig jobs to these five customers, and the Court of Appeals' opinion to the contrary is in clear violation of this Court's recent reiteration in *Anderson v. City of Bessemer City.* ____ U.S. ____, 105 S.Ct. 1504, 1512 (1985) that a district court's findings must be upheld even if the

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3 Since Pangborne and Pinney were twice indicted for rigging jobs in the Philadelphia area, they focus on facts relating to Philadelphia jobs. Lord and Sargent will undoubtedly stress facts relating to their indictments for jobs to a single customer at different locations. These different approaches are required to meet the allegations of the different indictments and are not contradictory.

appellate court would have reached a different conclusion had it been trier of fact.

The Court of Appeals ignored the findings of the district court on the issue of potential competition. While it is true that on a particular bid those not on the bid list for that job could not compete for that job, the undisputed evidence is that the customers did not use the same bid list for every job. The evidence showed that all the defendants competed for jobs in the Philadelphia area.[4]

Potential competitors are those who can compete with each other in the market, *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 330-333 (1961), and the undisputed evidence in this case supports the district court's finding that all defendants were potential competitors in the Philadelphia area.

The error in the Court of Appeals' approach is demonstrated by the fact that the Court's ruling is not even internally consistent. The undisputed evidence in the record shows that while a restricted bidders' list limited the competitors on each individual job, bidders' lists changed over time, with contractors being added and dropped. For example, in 1972 Sun Oil had Ortlip, Frazer, and Progressive Electric on its restricted bidders' list; in 1975 Sun added Foley to the list; in 1980 Pangborne was added. In 1972 Pangborne and Foley were rigging bids at Gulf, at U. S. Steel Fairless Works, and Arco. Thus, Pangborne and Foley were certainly potential competitors at Sun and in fact became actual competitors.[5]

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4 The Court of Appeals also ignored the explicit finding of the district court that the success of the conspiracy depended on the continuing cooperation of the conspirators:

> The parties' relationships at one facility depended upon their relationships at the others. If they could not work together and agree at one facility, they could not work together anywhere.

(App. B at 52a).

5 Similarly Frazer was added to the Lukens bid list in 1977. Frazer was a potential competitor at Lukens before it became an actual competitor at Lukens and Frazer was a potential competitor at U. S. Steel Fairless Works throughout the period of the conspiracy.

The logic that limited the bounds of a conspiracy to include only those on a customer's restricted bidders' list would compel the conclusion that, for example, at Sun the conspiracy from 1972 to 1975 was different from the one from 1975 to 1980 and that in 1980 a completely different conspiracy existed. Indeed, followed to its logical conclusion the Third Circuit's analysis requires that rigged jobs that do not have identical restricted bidders' lists must be the objects of separate conspiracies.

In Government Exhibit 1, introduced in the evidentiary hearing on the double jeopardy motion, the government listed over fifty jobs bid at U. S. Steel Fairless Works for which the only bidders were the defendants and alleged co-conspirators. But those fifty restricted bidders' lists were not identical: there are sixteen different bidders' lists used by U. S. Steel. The Court of Appeals' logic would require a finding of sixteen different conspiracies at U. S. Steel Fairless Works, not the single conspiracy it in fact found.

The bidders at U.S. Steel had no more control over the composition of any particular bid list than did the contractors at any other facility. Yet the Court of Appeals had no difficulty in finding a single conspiracy at U. S. Steel Fairless Works. The court recognized that at least as to Fairless Works, contractors cooperated where the bid lists were not identical and where they had no knowledge or control of the composition of future bid lists, because they considered the other cooperating contractors potential competitors in a conspiracy larger than a single bid list.[6] Precisely the same rationale should have led the court below to conclude that petitioners engaged in only a single conspiracy covering all bids during the relevant time period.

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6 Since the list of approved bidders at U. S. Steel Fairless Works changed over time, with actual/potential competitors being added and deleted, there must, perforce, have been more than one conspiracy at that location during the period covered by the indictment under the Third Circuit's view. Under the Court of Appeals' approach, therefore, this indictment should have been dismissed as duplicitous.

B. The Third Circuit's Decision Conflicts With the Decisions in Other Circuits

The novelty of the Third Circuit's view is further highlighted when viewed in contrast to similar cases in other circuits. In the typical bid rigging case the conspirators are the suppliers capable of competing in the relevant geographic market. Customers select the bidders from that group of conspirators for particular jobs. The conspirators who are selected for each job cooperate with each other as part of the overarching conspiracy. As shown below, the fact that targets of the conspiracy select fewer than all conspirators to bid specific jobs has not led the Courts of Appeals dealing with the issue to fragment a conspiracy into site-by-site or job-by-job conspiracies.

In *United States v. Consolidated Packaging Corp.*, 575 F.2d 117 (7th Cir. 1978), a manufacturer of folding cartons argued that evidence of its participation in nine bid rigging incidents to nine separate customers with a different cast of co-conspirators for each customer was insufficient to prove it participated in a national conspiracy involving dozens of folding carton manufacturers it did not know and thousands of jobs for customers it could not bid to. Affirming Consolidated's conviction the Seventh Circuit stated:

> It does not require any extensive use of imagination to see why dishonest businessmen working in the national marketplace believed that the general conspiratorial system functioning throughout much of the industry could be useful whenever needed. That many of the conspirators did not know each other, had no direct contact with each other, and were not always interested in the same customers was probably as immaterial to the conspirators as it is to us now.

575 F.2d at 125.

In *United States v. David E. Thompson, Inc.*, 621 F.2d 1147 (1st Cir. 1980), the defendant attacked its conviction for bid rigging on the ground that the evidence proved the existence of

multiple conspiracies, not the single overarching conspiracy charged in the indictment. The facts showed that sometime prior to 1962 the conspirators, manufacturers of architectural hardware, conspired to allocate bid work among themselves. They were actually able to control the list of bidders for any project and could easily allocate the work. By 1970, however, the industry practices had so changed that the hardware manufacturers could no longer control the bid lists. Bid rigging continued, albeit at a reduced level. Not all jobs were rigged, but from time to time the conspirators were able to cooperate with each other on individual jobs. The Court of Appeals, citing *United States v. Consolidated Packaging, supra*, affirmed the conviction, finding that there was sufficient evidence to allow the jury to find a single conspiracy from 1962 to 1977.

In *United States v. Beachner Const. Co., Inc.*, 729 F.2d 1278 (10th Cir. 1984), the government reversed its usual course of charging as large a conspiracy as possible and charged defendants with participating in separate bid rigging conspiracies for different road paving jobs in the State of Kansas. The defendant was charged first with rigging a single road paving job and later indicted for rigging three different jobs with different co-conspirators. The district court found that Beachner had participated in a single conspiracy to rig road work in Kansas over a twenty-five year period. The government contended that each project produced a separate conspiracy and that there was no interdependence among the contractors. The Court of Appeals disagreed, stating:

> [T]he weight of the evidence in the record shows that a contractor would participate in a bid-rigging plan with the belief that future benefits of some kind would be returned to him. No matter what the specific reasons for participating were, they were always that a contractor would eventually benefit in some way—usually through another's cooperation with his desire to set up a job.

729 F.2d at 1283 [footnote omitted].

The present case cannot be distinguished from the analysis in *Beachner*. In both cases there were restricted bid lists that were not identical from job to job. In both cases the government has argued for a finding that each bid constituted a separate conspiracy. The Court of Appeals for the Tenth Circuit did not allow the government to fragment the conspiracy and multiply prosecutions; the Third Circuit should be prevented from allowing an opposite result.

CONCLUSION

The Fifth Amendment provides protection against more than one prosecution for the same offense, *In re Nielsen*, 131 U.S. 176, 187 (1889), and protection against multiple punishments for the same offense. *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 168-69 (1874). But under the erroneous rule of law announced by the Third Circuit, that in a bid rigging case the relevant market is determined by the customer's selection of bidders, each bid can be characterized as a separate crime, regardless of the intent of the conspirators. The Third Circuit has presented the government with the means for atomizing virtually every bid rigging conspiracy into multiple indictments of the participants, resulting in multiple punishments of individuals and corporations for the same crime in a clear violation of the double jeopardy provision of the Fifth Amendment. The Court should grant certiorari to clarify the legal issues relating to bid rigging conspiracies and protect defendants' rights to be free from multiple prosecutions and multiple punishments for a single conspiracy.

For the reasons stated, petitioners respectfully pray that this petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 85-1262, 85-1263, 85-1264, and 85-1265

UNITED STATES OF AMERICA,

Appellant,

—v.—

SARGENT ELECTRIC CO., LORD ELECTRIC CO., INC., W.V. PANGBORNE AND CO., INC., J.A. BRUCE PINNEY.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Crim. No. 84-00313-01/02/03/04)

Argued December 2, 1985

Before ADAMS, GIBBONS, and STAPLETON, *Circuit Judges.*

(Filed March 14, 1986)

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OPINION ANNOUNCING THE JUDGMENT OF THE COURT

GIBBONS, Circuit Judge:

The United States appeals, pursuant to 18 U.S.C. § 3731 (1982), a district court order dismissing on double jeopardy grounds an indictment for violation of section 1 of the Sherman Act, 15 U.S.C. § 1 (1982). We reverse.

I.

District Court Proceedings

On July 19, 1984, a grand jury in the Eastern District of Pennsylvania returned an indictment charging Sargent Electric Company (Sargent), Lord Electric Company (Lord), W.V. Pangborne and Co. (Pangborne) and Pangborne's Executive Vice-President, J.A. Bruce Pinney, with violating section 1 of the Sherman Act by conspiring to rig bids for electrical construction work at the Fairless Hills Works of United States Steel Corporation in Bucks County, Pennsylvania (Fairless Hills). The four defendants moved to dismiss the indictment, all asserting that it was barred by the double jeopardy clause of the United States Constitution.

The first two defendants, Sargent and Lord, contended that the offense charged in the July 19, 1984 indictment was the same as that for which they previously had been convicted in the Western District of Pennsylvania. That conviction resulted from an indictment returned by a grand jury in the Western District of Pennsylvania on July 1, 1983, which charged that Sargent, Lord, and other electrical contractors had, for approximately seven years from 1974 to 1981, conspired to rig bids for electrical construction work at the Western Pennsylvania Works of U.S. Steel (Western Works). *See* Joint Appendix at 1230. This court affirmed judgments fining Sargent and Lord one million dollars each, the statutory maximum for violation of section 1 of the Sherman Act. *United States v. Fischbach & Moore, Inc.*, 750 F.2d 1183 (3d Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S. Ct. 1397, 84 L.Ed.2d 785 (1985).

With respect to the second two defendants, Pangborne and Pinney, they contended that the offense charged in the July 19, 1984 indictment was the same as that for which they had pleaded *nolo contendere* in the Eastern District of Pennsylvania. Those pleas followed a March 8, 1984 indictment that charged that Pangborne, Pinney, and other electrical contractors, "beginning in or about the late 1970's and continuing thereafter into about 1982," had conspired to rig bids for

electrical construction work at a Gulf Oil Company refinery in Philadelphia, Pennsylvania. *See* Joint Appendix at 1130. The district court accepted the pleas from Pangborne and Pinney on June 5, 1984 and sentenced them on July 19, 1984.

On the basis of these contentions, the district court ruled on November 13, 1984 that the four defendants had established prima facie cases of nonfrivolous double jeopardy claims and scheduled an evidentiary hearing on those claims. The court ordered the United States to disclose to the defendants all grand jury testimony regarding alleged illegal bid-rigging on steel and refinery jobs involving the indicted and unindicted co-conspirators named in the July 19, 1984 indictment. It then held a lengthy hearing and subsequently filed a memorandum concluding that there was at all relevant times one general understanding among all the participating electrical contractors that they would rig bids when circumstances permitted regardless of whether the job was at Western Works, at Fairless Hills, at the Gulf Oil refinery, or at several other locations. *United States v. Sargent Electric Co.*, Crim. Action No. 84-00313 (E.D. Pa. March 26, 1985). "Bid rigging at each of these facilities," the court concluded, "did not reflect separate conspiracies but simply separate manifestations of the same unlawful agreement to rig bids wherever and whenever possible." *Id.*, slip op. at 30. The district court therefore dismissed the indictment. This appeal followed.

II.

Scope of Review

The United States does not dispute the district court's ruling that the four defendants made out nonfrivolous claims of double jeopardy. Consequently, there is no question that once the defendants advanced their claims, the government assumed the risk of nonpersuasion of demonstrating by a preponderance of the evidence that the double jeopardy clause did not bar the challenged indictment. *United States v. Inmon*, 568 F.2d 326, 331-32 (3d Cir. 1977).

While the parties agree upon the applicability of *Inmon* to the proceedings in the district court, they disagree as to the scope of our review of that court's holding. The defendants urge that the district court's conclusion that "[b]id rigging did not reflect separate conspiracies but simply separate manifestations of the same unlawful agreement to rig bids wherever and whenever possible" is a factual determination that we cannot reverse on appeal without finding that the determination was clearly erroneous. The United States, on the other hand, contends that whether it met its burden of proving separate offenses is a question of law as to which this court exercises plenary review.

Although this court did not address in *Inmon* the scope of review issue that this case raises, we did do so in *United States v. Felton*, 753 F.2d 276 (3d Cir. 1985). In *Felton*, in which we reviewed a district court's denial of a motion to dismiss an indictment on double jeopardy grounds, the United States, as appellee, urged a position similar to that which the defendants here espouse. We rejected that argument, observing,

> We find it necessary to reiterate that on review the trial court's findings of narrative or historical facts are measured by the clearly erroneous test, but as to the legal component of its conclusion, this court has plenary review. Accordingly, what we must examine here is whether the district court correctly determined that as a matter of law the government met its burden of proving the separate conspiracies by a preponderance of the evidence. Such an inquiry requires us to examine the basic facts of record and the permissible inferences that may be drawn therefrom.

Id. at 278 (citation omitted). Thus *Felton* has classified as a legal issue, subject to plenary review, the question whether, from the narrative or historical facts the government established to the satisfaction of the district court, an inference of multiple conspiracies rather than a single conspiracy was permissible.

The procedural posture of this case is not identical with *Felton*, however, because in this case the district court granted the defendants' motion to dismiss. In *Felton* we held that the government failed to establish a prima facie case on the existence of conspiracy. Here, in order to reverse, we must hold not only that the United States made out a prima facie case on the existence of multiple conspiracies, but also that an inference of a single conspiracy was on this record clearly erroneous as a matter of fact or legally impermissible. Such a conclusion involves a much greater assertion of authority to set aside rulings of the court of first instance than was made in *Felton*. There may be cases where it would be possible to hold that as a matter of law no inference other than that of multiple conspiracies was permissible. In most cases, however, in which the government has made out a case satisfying the *Felton* threshold, competing inferences may be logically permissible, and in such cases the inference drawn by the court of first instance should stand.

Of course a district court's decision, even when couched in terms of inference drawing, may be predicated upon legal assumptions such as the elements of the offenses charged in successive indictments. As to such legal assumptions our reviewing function is obviously plenary. If, however, we should disagree with the district court's legal assumptions of the elements of the offenses charged—here Sherman Act conspiracies—such disagreement would not necessarily permit us to select among competing permissible inferences. At most such a disagreement would require a remand for reconsideration. *See United States v. Young*, 503 F.2d 1072, 1076 (3d Cir. 1974).

Thus for the United States to prevail in this appeal we must (1) hold that the district court misunderstood the elements of a Sherman Act conspiracy or (2) hold that the court's findings on historical or narrative facts are clearly erroneous, or (3) hold that the only inference that may be drawn from those facts is that the bid-rigging conspiracy aimed at Fairless Hills was separate from those aimed at Western Works and Gulf's Philadelphia refinery.

III.

Elements of an Antitrust Conspiracy

Unlike statutes such as 18 U.S.C. § 371 (1982) and 21 U.S.C. § 846 (1982) that speak of conspiracy to commit crimes defined in other federal statutes, section 1 of the Sherman Act is self-contained. It makes illegal contracts, combinations, or conspiracies "in restraint of trade" and punishes as a felony every contract, combination, or conspiracy "hereby declared to be illegal." 15 U.S.C. § 1 (1982). Thus unlike other federal conspiracy statutes section 1 of the Sherman Act does not refer us elsewhere for the substantive elements of the prohibited conduct. As in all conspiracy statutes, concert of action is a substantive element, but under governing caselaw more than mere concert of action is required. The illegal object of a Sherman Act conspiracy must be identified in terms of an intended or achieved effect upon commerce in a relevant market, a market not defined by statute.

When the concerted action is price-fixing or bid-rigging, the Sherman Act caselaw shortcuts the inquiry into market effect, by treating such concerted actions as per se violations. Those activities are deemed to be per se illegal, in the sense that the court will not consider evidence that their effects upon commerce in a relevant market might have had a pro-competitive purpose and effect. The bid-rigging activities charged in the several indictments before us fall within that per se category. But while the per se rule proscribes inquiry into competitive effects, it does not excuse identification of relevant markets. An agreement among persons who are not actual or potential competitors in a relevant market is for Sherman Act purposes *brutum fulmen*. An agreement "to rig bids wherever and whenever possible" is meaningless for Sherman Act purposes unless there are in the real world of the marketplace some "whens" and "wheres."

To some extent, of course, a horizontal agreement tends to define the relevant market, for it tends to show that the parties to it are at least potential competitors. If they were not, there would be no point to such an agreement. Thus its very

existence supports an inference that it would have an effect in a relevant market. Where, as here, however, the disputed issue is the existence or scope of the alleged horizontal agreement that is to be inferred from circumstantial evidence, the first inquiry must be whether or not each firm alleged to have been a party to it was an actual or potential competitor in that market. Membership in a bid-rigging conspiracy aimed at Western Works, for example, would not have any actual or potential effect upon Gulf Oil Company's Philadelphia refinery unless there was actual or potential competition for electrical work at that refinery by the Western Works conspirators.[1]

The district court's analysis placed principal reliance upon evidence that all alleged conspirators had a common objective: the elimination of price competition whenever and wherever possible. But as we note above, that common purpose is not alone sufficient to establish a violation of section 1 of the Sherman Act. Thus the district court's focus upon facts suggesting such common purpose arguably ignored the essential market element of a Sherman Act offense and gave insufficient weight to the government's proofs respecting that element.

Because Sherman Act conspiracies involve a relevant market and that market may vary over time, the government's task in drafting indictments is somewhat more complex than in other conspiracy contexts. The difficulty is illustrated by the contrasting positions taken by Sargent and Lord in this case and in their appeal from the sentence imposed in the Western District of Pennsylvania. In that case the indictment charged a conspiracy to fix the prices at which electrical construction projects at Western Works were bid. Sargent argued on appeal that

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1 That is not to say that for some antitrust purposes all the defendant electrical contractors may not be potential competitors. They well might be, for example, for the purpose of a nonconspiratorial statute like section 7 of the Clayton Act, 15 U.S.C. § 18 (1982). But the fact that they are potential competitors for the purpose of antitrust laws aimed at preventing potential future injury to competition does not support a legitimate inference that those defendants entered into a conspiracy with respect to specific markets defined by the independent economic decisions of persons unrelated to and uncontrolled by them.

there was a fatal variance between the indictment and the proofs at trial in that they failed to establish that *all* bids at Western Works were rigged. Alternatively Sargent argued that the government had proved not one continuing conspiracy, but a series of independent conspiracies. 750 F.2d at 1189. Lord also argued that the government proved fourteen separate conspiracies, while the indictment charged one. *See id.* at 1190. This court held that the indictment alleged a single conspiracy to rig bids at Western Works and that proof of fourteen instances of such bid-rigging permitted the jury to conclude that the conspiracy encompassed all bids. *Id.* In this appeal, on the other hand, Sargent and Lord both allege that the trial of the prior indictment put them in jeopardy with respect to a conspiracy that was aimed at different steel mills of U.S. Steel and different corporations over extended time periods. Had the government known about bid-rigging at other locations when the July 19, 1984 indictment was drawn and had it drawn that indictment to charge an agreement to rig bids "wherever and whenever possible," we may be certain that the defendants would have urged prior to trial that the indictment should be stricken as prejudicially duplicitous. Had the July 19, 1984 indictment been drawn with a separate count addressed to the bid-rigging activities of the defendants at different locations, both their pretrial and posttrial claims would have been that the indictment was multiplicitous.

For purposes of the double jeopardy clause it is appropriate to consider how the government could have drawn the first indictments. None of the four defendants before us in this appeal was acquitted in a prior proceeding. Thus they cannot rely upon the collateral estoppel component of the double jeopardy defense announced in *Green v. United States*, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957) and applied to the states in *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). They rely on two different and complementary aspects of double jeopardy: protection against more than one prosectuion for the same offense. *In re Nielsen*, 131 U.S. 176, 187, 9 S.Ct. 672, 675, 33 L.Ed. 118 (1889), and protection against multiple punishments for the same offense.

Ex Parte Lange, 85 U.S. (18 Wall.) 163, 168-69, 21 L.Ed. 872 (1873). The standard of these aspects of double jeopardy is no different pretrial and posttrial.[2] The defendants' position, if accepted, means that in their initial prosecution the same grand jury could not have charged them with separate Sherman Act offenses. Our inquiry now is no different, legally, than that which would have faced the district court had multiple counts been pleaded in the initial indictment against each defendant. We must determine whether there was a conspiracy aimed at a single relevant market or conspiracies aimed at several separate markets. To put the same question in slightly different words, we must determine whether charging several Sherman Act violations was multiplicitous.

IV.

The District Court's Findings

Because the district court placed primary reliance upon the common objective of price-fixing, its discussion of the narrative or historical facts emphasized those facts tending to support the inference that there was such a common objective. In the only real discussion of the market aspect of the Sherman Act offense the court observed,

> In the present case, there is the potential for competition. If the contractors were added to the bid list at a facility, they would be able to compete for jobs. The contractors were not physically or economically incapable of competing for contracts, they were only prevented from doing so *by the regulations at each facility.* There was always the possibility that a contractor would be

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2 Justice Brennan's position, announced in his concurring opinion in *Ashe v. Swenson*, 397 U.S. at 453-54, 90 S.Ct. at 1199, that there is a fourth double jeopardy principle permitting joinder of multiple offenses, but not separate trials, growing out of the same transaction or occurrence, has not received majority support in the Court. If separate Sherman Act offenses are charged in the indictments before us, however, we believe his *Ashe v. Swenson* test would be satisfied.

> added to the bid list and, thus, all the contractors were potential competitors.

Sargent Electric, Crim. Action No. 84-00313, slip op. at 28 (emphasis supplied). The court's reference to the "regulations at each facility" is to the undisputed evidence that at each facility where bid-rigging charged in any of the indictments is alleged to have occurred, only electrical contractors on a pre-approved bid list were permitted to examine construction documents and submit bids. The court found, moreover, that all the companies affected usually invited the same contractors to bid on each of their projects. *Id.* at 4. In the case of U.S. Steel, separate bid lists were maintained for Western Works and Fairless Hills. Meetings were held among representatives of the conspirators separately for each project. The district court found,

> At the meetings, the parties decided among themselves who the low bidder would be for that particular project. The bid each contractor was to submit on the project was determined either during or after the meeting. The jobs were allocated among the participants so that each contractor on the bid list would receive a fair share of the projects let by the particular facility. . . .
>
> The members of the conspiracy kept records concerning how the jobs were allocated. Separate records were kept for each facility. There was no bookkeeping system for the conspiracy as a whole.

Id. at 7.

If all bidders were on the bid list at each facility, or even if each bidder, by some action within its own control or the control of the other alleged conspirators, could get on each bid list, the court's conclusion that there was a potential for competition at each facility would plainly be a permissible inference. The undisputed facts, however, are otherwise.

Four companies, Pangborne, H.B. Fraser Co., Ortlip Co., and The Foley Co., were charged in the indictment to which Pangborne and Pinney pleaded *nolo contendere* to having rigged bids at Gulf's Philadelphia refinery. These bidders were

qualified by Gulf to submit bids for work at the facility. Of these, only Pangborne, Ortlip Co., and The Foley Co. were on the Fairless Hills qualified list. That list included, besides Pangborne, Ortlip Co., and The Foley Co., Sargent, which was not qualified by Gulf to bid for work at the Philadelphia refinery. Lord, Sargent, The Foley Co., and Fischbach and Moore (Pangborne's parent corporation) were on U.S. Steel's qualified list for Western Works. Pangborne, H.B. Fraser Co., and Ortlip Co. were not. Sargent and Lord were on the qualified list at Fairless Hills, but neither Lord nor Sargent nor Fischbach and Moore were qualified at Gulf. Thus the only alleged co-conspirator qualified to bid at all three facilities was The Foley Co., an indicted co-conspirator in the July 19, 1984 indictment and an unindicted but named co-conspirator in the other two indictments.

The district court did not find, and the record would not support a finding, that it was within the power of bidders, singly or collectively, to get on the list of qualified bidders at these separate facilities. That was entirely within the control of the management of those facilities. Instead the district court found that "[t]he contractors could not place themselves on the bid list, nor could they attempt to compete for projects at that facility unless they were on the bid list." *Id.* at 27.

Given the incongruity in membership of the approved bidder lists and the fact that those lists were controlled by the management of the separate facilities, it is not surprising that, as the court found, "Only the contractors on the bid list for that project would attend the [bid rigging] meeting. If a contractor was not on the bid list for a particular project, the contractor would not even be informed that a meeting was to take place." *Id.* at 6. The court found, moreover, that "[o]n those occasions when a contractor would be dropped from the list for a period of time it would not participate in the scheme. If, later, it was put back on the list it would resume its conspiratorial activities." *Id.* at 12.

The court's observation that "there is the potential for competition," *id.* at 28, if it is intended as a legal conclusion, is inconsistent with the underlying factual findings and the undis-

puted facts. There is no potential competition between a party not on an approved list of vendors and a party on such a list. If it is intended as a finding of fact, that finding is on this record clearly erroneous. The government's evidence, which is not disputed, is that the managements of the purchasers by their independent actions determined the competitors at each facility, and thus the relevant market for purposes of section 1 of the Sherman Act.

The district court bolstered its single violation analysis by discounting certain other evidence tending to show that there were separate agreements or understandings with respect to each facility. Conceding that separate meetings took place for bid-rigging on different facilities, the court noted that "[t]he differences in meeting places does not indicate separate facilities, it simply demonstrates the adaptability of the scheme to the circumstances." *Id.* at 30. Differences in the manner in which bids were prepared and submitted at different facilities were dismissed as "simply adaptations of the same scheme to the individual requirements of each victim." *Id.* at 29. While observing that "[t]he parties' relationships at one facility depended upon their relationship at the others," the district court discounted the undisputed fact that The Foley Co. did not rig bids at Western Works or at Lukens Steel while it participated in bid-rigging at Gulf's Philadelphia refinery and at Fairless Hills. The court disregarded, as well, the undisputed fact that while Lord rigged bids at Western Works and at Fairless Hills, it did not do so at Lukens Steel. Conceding that not all the participants were active at every facility and that not all the participants even knew each other, the district court discounted the significance of these facts by noting that "members of a single conspiracy do not have to know or have direct contact with each other." *Id.* at 21.

These explanations of undisputed facts, which on their face tend to suggest separate agreements or undertakings with respect to each facility, would be plausible except for the absence of any evidence tending to show that the conspirators had any control over the dimensions of the market defined by the purchasers' independent decisions to deal only with pre-

qualified bidders. We accept as true the underlying facts. The district court's explanations for their insignificance, if those explanations are intended as findings of fact, are clearly erroneous. Probably they are not so intended, but are merely legal argument. As such they suffer from the fundamental error that permeates the district court memorandum; namely, focusing on the common motive of fixing prices while disregarding the other essential element of a section 1 Sherman Act case, relevant market.

The district court also relied upon the fact that the time periods during which bid-rigging occurred at the various facilities were "basically congruent." *Id.* at 20. This finding is supported by the record in a limited sense. For some period between 1971 and 1981 bid-rigging was going on at all three facilities. However, the undisputed evidence—in particular the immunized testimony of Paul Arbogust [*sic*; should read "Arbogast"] of Lord—suggests that the bid-rigging began at each facility at a different time and ended at each facility at a different time and for different reasons. Thus the fact that the times of the bid-rigging were "basically congruent," while of some evidentiary significance, cannot be relied upon as establishing that there was a single conspiracy. The district court discounted the different reasons for terminating bid-rigging at each facility as irrelevant, asserting that the events leading to termination "were events over which the conspirators had no control." *Id.* at 20. This very absence of control, however, is strong evidence of the absence of interdependence among the separate markets and thus undercuts the court's ultimate conclusion that the participants acted pursuant to a single overarching conspiracy.[3]

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3 Judge Stapleton's concurring opinion develops the absence of evidence which would justify a finding of a single overreaching conspiracy. I fully agree with that analysis.

V.

Disposition

The district court's faulty legal analysis, which focuses exclusively upon the concert of action component of a section 1 violation, so permeates its decision that the order appealed from cannot stand. If the court's observation that there existed the potential for competition among all the conspirators at each facility and its conclusion that the bid-rigging schemes at all three facilities amounted to but one Sherman Act offense are regarded as findings of fact, they are inconsistent with the court's findings of narrative or historical fact, are inconsistent with the record, and are clearly erroneous. If they are regarded as conclusions of law, they are erroneous for the reasons set forth in Part III.

The question that remains is whether we should remand for further proceedings on the double jeopardy issue or simply reverse. It seems to us that the historical or narrative facts found by the district court require a holding that the United States established, as a matter of law, that the bid-rigging at the different facilities constituted multiple Sherman Act offenses. The district court found that at each facility there were separate bid lists; that the purchasers, not the bid-riggers, controlled access to those bid lists; that the membership of different lists were not identical; that some firms qualified to bid at more than one facility did not rig bids at all of them; that separate bid-rigging meetings were held with respect to each facility; that the allocation of business among the bid-riggers was made on a facility-by-facility basis; that not all the conspiring personnel knew each other; that the bid-rigging commenced at each facility at different times; and that bid-rigging ended at each facility at different times and for different reasons. These findings, absent others pointing the other way, establish that there were separate offenses. No other findings, except the legally flawed conclusions about potential competition, point the other way. Given these historical facts, any ultimate finding of a single conspiracy would be clearly erro-

neous. Thus we will reverse with a direction that trial on the July 19, 1984 indictment may go forward.

STAPLETON, Circuit Judge, concurring.

Since I agree that the record will support only a finding of site-by-site conspiracies, I join the disposition of the court.

I begin with the uncontested facts that (1) there was an agreement among bidders at Western Works, including Sargent and Lord, to rig bids at that site, (2) there was an agreement among bidders at Fairless, including Sargent, Lord, and Pangborne, to rig bids at that site, and (3) there was an agreement among bidders at Gulf, including Pangborne, to fix bids at that site.

To reach the legal conclusion that it did, the trial court necessarily found as a fact that the defendants had not simply made site-by-site decisions to cooperate in rigging bids, but also that each had committed itself to rig bids at a universe of sites including Western Works, Fairless, and Gulf. Since there was no evidence, economic or otherwise, which would meaningfully distinguish any subset of sites that included Western Works, Fairless, and Gulf from the total universe of sites at which rigging was known to have occurred, the trial court concluded that each of the defendants and their competitors had committed itself to rig bids whenever and wherever the conspirators (whether or not presently known to it) might find themselves bidding against one another on a restricted list.

Recognizing that the crucial issue is whether there was ad hoc, site-by-site decision-making or a commitment by each conspirator to rig bids across a potentially limitless universe of sites, it is helpful in determining what inferences may rationally be drawn from the circumstantial evidence. Experience teaches that one seeking to maximize his risk/benefit ratio will generally prefer to make ad hoc decisions that can take into account the facts of each situation bearing on benefit and risk unless there is some substantial benefit attainable from a

broader commitment which is unobtainable through ad hoc decision-making. Because this record is barren of any suggestion of a substantial benefit available from an "overarching" conspiracy that was not available through ad hoc, site-by-site decision-making and because all of the circumstantial evidence either strongly favors or is consistent with a finding of multiple conspiracies, I conclude that the district court's finding of an overarching conspiracy is clearly erroneous.

Neither the trial court nor the dissent suggests that a single site conspiracy to rig bids could not be successful without an overarching conspiracy.[1] Nor do I understand either to say that an overarching conspiracy was shown to have been safer or to have had the potential for generating greater rewards than a series of site specific conspiracies. Each finds it significant, however, that the bidders who were able to trust one another at one site would be able to trust one another at a second site. While this is true, it is beside the point. No one would dispute that to a firm interested in bid rigging, knowledge as to the identity and trustworthiness of others willing to do the same is of great value. But on this record, such knowledge was as available and as valuable to a firm making site-by-site decisions on whether to rig bids as it would have been to a member of a grander conspiracy. In short, the "trust factor" provided no motivation for a prospective conspirator to forego the natural preference for site-by-site decision-making.

The trial court found or the undisputed evidence demonstrated (1) that there was a different group of bidders at each site; (2) that separate bid rigging meetings were held,[2] and

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1 If this kind of interdependence had been shown, it would, of course, have been strong evidence of a single conspiracy.

2 The Gulf meetings were held at the National Electrical Contractor's Assoc. building in Philadelphia. Fairless meetings were held at the Philadelphia Airport Hotel, except for one held at a Pittsburgh Airport Hotel. Western Works meetings were held at the Duquesne Club in downtown Pittsburgh. [173a, 613a-14a, 439a-40a, 450a, 536a].

separate records maintained[3], for each site; (3) that precautions taken against discovery varied[4]; (4) that the allocation of business at Western Works, Fairless, Gulf and virtually all other sites was made exclusively on a site-by-site basis despite the feasibility of trade-offs between sites as demonstrated by those which occurred between Western Works and Jones & Laughlin Steel[5]; (5) that the method for designating the low bidder varied[6]; (6) that some firms qualified to bid at more than one site did not rig bids at all of them[7]; (7) that not all of the conspiring personnel knew one another; (8) that several of the purported "core" conspirators did not know that bid rigging was going on elsewhere than at their particular loca-

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3 The records and discussions never related to other sites. [173a].

4 At Fairless, no codes or special precautions against detection were taken, and participants would enter and leave the meetings together [458a]. At Western Works, meetings were called by using a code. [458]. The participants would go to and leave the Western Works meetings in secrecy. [459a, 398a-99a].

5 There were no trade-offs between jobs at Gulf and any other location or between jobs at Fairless and any other location. [552; 559; 650; 496-97; 449; 465; 548; 628; 630; 596-97; 594]. There were no trade-offs between Western Works and Fairless. [464; 496-97; 924]. However, there were trade-offs between jobs at Western Works and J & L Steel [502-03], even when bid lists were not identical between the two operations. [980-82]. The court did not credit the failure to allocate jobs on a conspiracy-wide basis because the lack of similarity between the bidders at the various locations made trade-offs "simply impractical" [192]. The court did not, however, explain why trade-offs were impractical between all the other conspiracy locations except Western Works and J & L Steel.

6 A dual rotation system was employed at Gulf—one rotation for jobs under $100,000 and a second one for jobs over that amount. [753, 764]. At Fairless, the low bidder was not determined by rotation, and so could not be ascertained prior to the meeting [616]. Instead, at Fairless, the decision was made ad hoc in an effort to equalize the dollar volume of the work. [447, 539]. At Western Works, the low bidder was determined by dollar volume. [396, 917].

7 180a-81a, 480a.

tion[8]; (9) that the bid rigging commenced at each site at a different time[9]; and (10) that the bid rigging ended at each facility at different times and for different reasons.[10] These findings of historical fact and this undisputed testimony, in the absence of unambiguous evidence suggesting an overarching conspiracy, cumulatively compel a conclusion that those rigging bids were making ad hoc decisions on whether to rig at each site.

The few facts relied upon by the trial court in reaching a contrary conclusion are equally consistent with a finding of multiple conspiracies and, accordingly, do not provide unambiguous evidence of an overarching conspiracy. The district court specifically looked to Tri-City's withdrawal both from the Fairless and the Western Works schemes [193a, 179a, 494a-95a] as evidence that the schemes were so interdependent that "[i]f they could not work together and agree at one facility, they

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8 For example, Geuther of Foley testified that he was unaware of bid rigging at Western Works or Lukens [627a, 634a]. Therrien of Meade testified that he was unaware of any bid rigging taking place in Philadelphia [408a-09a]. Frazer of Frazer did not know that bid rigging was going on at Sun until he started attending meetings to rig bids in 1973 [769a]. Frazer also testified that he did not know that bid rigging was going on at Fairless and Western Works, and did not know that there were meetings held at the Philadelphia Airport Hotel to rig bids [770a-71a]. Gosewisch of Frazer was unaware that there was rigging going on at Fairless [654a]. Spang of Riggs Distler had no knowledge of rigging at Western Works, Fairless, Gulf, Sun, or Lukens [693a].

Arbogast of Lord did testify that, in his opinion, the Western Works and Fairless schemes were part of one whole [910a-11a]. But his testimony did not show any awareness that this scheme extended beyond U.S. Steel or included Gulf. [*Id.*] Arbogast did not suggest that any of the Western Works and Fairless schemes were dependent on each other. Thus Arbogast's testimony is as consistent with multiple conspiracies as with a single conspiracy. Perrott of Lord testified that he considered the Western Works and Fairless schemes as two separate areas and two separate circumstances [464a, 496a-97a].

9 172a.

10 181a.

could not work together anywhere." However, this withdrawal is no more probative of a single than of several agreements. If an individual who is involved in more than one illegal conspiracy resolves to discontinue his illegitimate activities, his departure from both does not unify otherwise unrelated schemes.

Also, the district court believed that Frazer had agreed to rig bids at Lukens without being rewarded at Lukens, implying that Frazer did this so it would be rewarded elsewhere [193a]. The alternative explanation of Frazer's actions is consistent with the existence of multiple conspiracies, however, and seems considerably more likely. Frazer bid on a project at Lukens that it did not want to obtain so that it could remain on Lukens' bidding lists for future work [793a-94a]. A failure to bid on current jobs might have precluded Frazer from working at Lukens in the future [802a-03a]. In fact, it is uncontradicted that Frazer did just that on at least one job at Gulf that it had no desire to obtain [783a-84a].

Finally, the court found that the bid rigging at Western Works and Fairless was interconnected partly because of a meeting called to resolve a dispute after Sargent had underbid the designated low bidder on a Fairless job [192a-93a]. However, the testimony was undisputed that the meeting *only* related to Fairless, and no mention was made of non-Fairless jobs. The only connection to Western Works was that the meeting took place in Pittsburgh, not Philadelphia. However, this meeting took place at the Pittsburgh airport and not at the Duquesne Club, where the Western Works conspirators met. Only those who were involved with bid rigging at Fairless were present [546a-47a; 621a-22a].[11]

In sum, while there are a few record facts which are consistent with the hypothesis of an overarching conspiracy, no one has provided a persuasive reason why the defendants would have been interested in joining one and the evidence as a

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11 The fact noted by the district court that there was some overlap in the periods of and the participants in the rigging at the various sites is similarly as consistent with multiple conspiracies as with a single one.

whole cumulatively compels a conclusion that they did not. Accordingly, proceedings should go forward on the July 19, 1984 indictment.

ADAMS, Circuit Judge, dissenting.

Defendants' guilt is not at issue in this appeal. Indeed, it is conceded by defendants that for many years they engaged in the rigging of bids for electrical contracting projects at various steel plants and oil refineries throughout Pennsylvania, in violation of the antitrust laws. What is at issue here is whether the indictment of defendants for bid-rigging in the present case, following their convictions or nolo contendere pleas in previous prosecutions for bid-rigging, violates their constitutional right not to be twice placed in jeopardy for a single crime.

The Fifth Amendment of the Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The bar against double jeopardy was taken from the English common law, where the concept developed as early as the thirteenth century. *See, e.g., United States v. Wilson*, 420 U.S. 332, 339-40 & n.6, 95 S.Ct. 1013, 1019-20 & n.6, 43 L.Ed.2d 232 (1975); *Bartkus v. Illinois*, 359 U.S. 121, 151-55, 79 S.Ct. 676, 695-697, 3 L.Ed.2d 684 (1959) (Black, J., dissenting); Kirk, *"Jeopardy" During the Period of the Year Books*, 82 U. Pa. L. Rev. 602 (1934). Among other things, the clause was designed to protect against a second prosecution for a single offense and multiple punishments for the same offense. *See North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969). The Supreme Court has repeatedly stressed that the guarantee against double jeopardy is "a fundamental ideal in our constitutional heritage." *Benton v. Maryland*, 395 U.S. 784, 794, 89 S.Ct. 2056, 2062, 23 L.Ed.2d 707 (1969).

The opinion announcing the judgment of the Court concludes that the district court erred both in fact and in law in

determining that defendants were potential competitors at the various facilities at which bid-rigging was practiced, and that their bid-rigging activities were conducted pursuant to a single over-arching conspiracy in violation of section one of the Sherman Act, 15 U.S.C. § 1 (1982). It asserts that defendants and their alleged co-conspirators were not competitors at each of the locations, and holds as a matter of law that noncompetitors cannot conspire in restraint of trade. The opinion thus determines that the conspiracy charged in this prosecution and those charged in prior indictments are not the same, and that defendants' double jeopardy rights therefore are not abridged. Because I disagree with that legal analysis, and with the application of such an analysis to the facts present in the record, and because I differ from the conclusion of the concurring opinion that this Court is free to disturb the trial court's finding of a single conspiracy, I respectfully dissent.

I.

Defendants Lord Electric Company (Lord) and Sargent Electric Company (Sargent) were indicted in July 1983 for rigging bids at the Western Pennsylvania Works of United States Steel Corporation. Also indicted were Fischbach & Moore, Inc., the parent corporation of W.V. Pangborne & Co., Inc. (Pangborne), a defendant in this action, and a number of other electrical contracting companies and their individual officers. On March 7, 1984, Lord, Sargent, and Fischbach & Moore were convicted of violating section one of the Sherman Act and each was fined $1,000,000, the maximum penalty allowable under the Act. *See United States v. Fischbach & Moore, Inc.*, 750 F.2d 1183 (3d Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S. Ct. 1397, 84 L.Ed.2d 785 (1985).

Defendants Pangborne and J.A. Bruce Pinney, the Executive Vice President of Pangborne, were indicted on March 8, 1984 on charges of rigging bids for electrical contracting work at the Philadelphia refinery of Gulf Oil Company, in violation of section one of the Sherman Act. They pleaded nolo contendere to the charges and were sentenced on June 19, 1984.

The indictment underlying the present prosecution was returned by a grand jury in June 1984, on the same day that Pangborne and Pinney were sentenced for their bid-rigging activities at the Gulf Oil refinery. It charged Pangborne, Pinney, Lord and Sargent with conspiring to rig bids at the Fairless Hills plant of United States Steel Corporation, in violation of section one of the Sherman Act. Prior to trial, all four defendants moved to dismiss the indictment on the ground that the activities leading to their previous convictions or nolo pleas were part of the same conspiracy as the bid-rigging alleged in the Fairless Hills indictment. They thus contend that the second indictment for the same offense under the Sherman Act, based upon identical evidence of conspiracy, infringed their rights under the double jeopardy clause. After conducting an extensive hearing on the issue, the district court found as a fact that the bid-rigging conducted at the Western Pennsylvania Works, the Gulf Oil refinery, and the Fairless Hills plant, as well as that at several other Pennsylvania facilities,[1] had taken place pursuant to a single, broad conspiracy in which Lord, Sargent, Pangborne and Pinney had been participants. It therefore granted defendants' motion to dismiss the indictment on the basis of double jeopardy.

II

A.

As explained in Judge Gibbons' opinion, each of the companies that solicited bids from defendants and their co-conspirators maintained selected bidders' lists. When a project became available, only those electrical contracting firms currently named on the bidders' list were invited to submit bids. The same names did not always appear on a given company's list, although some names were included more often than others. Because of the policy of employing selected bidders' lists,

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1 These facilities included the Lukens Steel plant in Coatesville, the Sun Oil Company plant in Marcus Hook, and the Atlantic Richfield refinery in Philadelphia.

competition for any given project was limited to those electrical contractors who were invited to submit bids.

Judge Gibbons' opinion asserts that the use of bidders' lists by the targets of the bid-rigging scheme precludes as a matter of law a finding that the bid-rigging conducted at Fairless Hills, the Western Pennsylvania facilities, and Gulf Oil was embraced by a single conspiracy in which all four defendants were participants. It states that, because the bidders' lists restricted the scope of competition for a project to those named in the lists, a conspiracy between contractors "qualified" to bid and those not invited to bid could not in any way restrain trade. Since section one of the Sherman Act prohibits only conspiracies in restraint of trade, the argument continues, it follows that qualified bidders and unqualified bidders cannot be parties to a single conspiracy to rig bids.

The lone case cited that arguably adopts the position espoused by Judge Gibbons, which is of course crucial to his conclusion, is *United States v. Ashland-Warren, Inc.*, 537 F. Supp. 433, 443, 445 (M.D. Tenn. 1982). There, Ashland-Warren argued that its previous convictions for bid-rigging in the highway paving industry in Virginia barred its prosecution for similar bid-rigging in Tennessee. The district court rejected the argument, stating that, as Virginia paving contractors did not compete with Tennessee contractors for paving jobs, they could not all be participants in a single bid-rigging conspiracy.

Ashland-Warren is distinguishable from this case on a number of grounds. First, in *Ashland-Warren*, the only contractor that had participated in both the Virginia and the Tennessee bid-rigging schemes was Ashland-Warren. *Id.* at 440. With this minimal degree of overlap, there could have been no showing of interdependence between the two schemes, such as was made here. Second, the highway paving industry is significantly different from the electrical contracting industry in that the geographical area within which a paving contractor may provide services is limited by the nature of its business. As the *Ashland-Warren* court pointed out, since hot asphalt cannot be hauled more than forty miles before it hardens, the location of a paving contractor's plant imposes geographical limits upon

the area within which it can compete. *Id.* at 438, 443. In light of these limitations, *Ashland-Warren* concluded that Virginia paving contractors and Tennessee contractors did not compete for the same jobs. *Id.* The record in this case reveals no such geographical constraints upon defendants' ability to compete.

Because of its unique facts, *Ashland-Warren's* statement that only competitors can conspire to restrain trade is subject to varying interpretations. However, it is significant that at least two courts have expressly declined to follow *Ashland-Warren*. *See United States v. Waldbaum, Inc.*, 612 F. Supp. 1307, 1313 (D. Conn.) *aff'd sub nom. United States v. Korfant*, 771 F.2d 660 (2d Cir. 1985); *United States v. Beachner Construction Co.*, 555 F. Supp. 1273, 1282 (D. Kan. 1983), *aff'd*, 729 F.2d 1278 (10th Cir. 1984).

Even assuming that Judge Gibbons' view that noncompetitors can never conspire to restrain trade has some validity in theory, it seems unlikely that a situation would actually arise in which two conspirators that are truly not in competition would agree to engage in an anticompetitive practice when that agreement could in no way benefit either conspirator.[2] Any such agreement to restrain trade would be ineffectual absent the participation of other conspirators who were in competition with both of the noncompeting parties. Only the involvement of such additional conspirators would create the potential for successful anticompetitive practices.

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2 In cases involving per se violations of section one of the Sherman Act, such as bid-rigging, a determination of market power is deemed unnecessary, *see, e.g., United States v. Socony-Vacuum Co.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940); *Fischbach & Moore, Inc.*, 750 F.2d at 1192, as it is presumed that such pernicious practices have an adverse impact on competition. Indeed, in *Socony-Vacuum*, the Supreme Court stated that to establish a violation of section one in a per se case, the prosecution need show no more than a purpose to engage in the illegal practice, and that it is unnecessary to establish either the commission of an overt act or "that the conspirators had the means available for accomplishment of their objective. . . ." *Id.* at 225 n.59, 60 S.Ct. at 846 n.59. Thus, while in a case subject to the rule of reason an identification of the relevant market might be useful in determining the scope of an anticompetitive conspiracy for double jeopardy purposes, that is not the situation here.

To illustrate, suppose contractors A and B conspire to rig bids with C at one facility, with D at a second facility, and with E at a third.[3] Further suppose that C, D, and E would each submit bids at all three locations if they could, but are presently limited to bidding at a single location by the facilities' policy of using selected bidders' lists. Under the majority's analysis, each of these instances of bid-rigging is necessarily the object of a separate conspiracy to restrain trade, as C, D, and E do not compete with one another for contracts at all the locations. This is so even if the three facilities are situated in the same city. Thus, under the majority's view, contractors A and B could be indicted three times, once for their activities at each of the three plants.

Yet, on the hypothesized facts, it is clear that the continuing cooperation of A and B is essential to successful bid-rigging at all three locations. If a dispute arises between A and B at the first location, which results in a rupture in their conspiratorial relationship, that rupture will cause them to cease rigging bids at the second and third locations as well. Thus, the effects of any disagreement or lack of trust between A and B will be felt by their three co-conspirators, regardless of whether the dispute arises out of bid-rigging at only one facility. Because this is so, although C, D, and E do not rig bids at all three plants, each has an interest in and will encourage bid-rigging at each location. This shared purpose that bid-rigging shall occur at all three plants is even stronger if C, D, and E have reason to believe that changes in the selected bidders' lists may result in their becoming eligible to bid at each facility. In my view, if the bid-rigging at the various plants is the purpose and result of a single agreement among the five contractors, the existence of selected bidders' lists does not preclude the conclusion that

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3 The hypothesized facts may be visualized thus:

Facility One	*Facility Two*	*Facility Three*
A	A	A
B	B	B
C	D	E

there is a single conspiracy to restrain trade both under section one of the Sherman Act and under the double jeopardy clause.

The hypothetical fact pattern set forth above fairly describes the situation presented by the record in the case at hand. While it may be true that neither Lord nor Sargent competed for contracts at the Gulf Oil refinery, both of them submitted bids at the Western Pennsylvania Works and at Fairless Hills, and thus competed with a number of other bidders at the latter two locations. Likewise, although Pangborne did not compete for bids at the Western Pennsylvania plants (its parent corporation, Fischbach & Moore, Inc. did, however), it competed at Gulf Oil and at Fairless Hills. In short, there was considerable overlap among the bidders competing for projects at the three locations specified in the indictments here, as well as among the bidders competing for jobs at all of the facilities that the district court found were within the scope of the bid-rigging conspiracy. As a consequence, Lord and Sargent had an interest in the continued successful rigging of bids and in the cooperation of competitors at Gulf Oil despite their lack of participation at that location. This was so because if the conspirators at Gulf Oil were unable to rely upon one another to rig bids at that location, they would inevitably withdraw from the bid-rigging at other locations where Lord and Sargent did compete.

Indeed, the district court found that two incidents occurred which showed that suspicions regarding the reliability of one conspirator at one location would affect the viability of the conspiracy at other locations. In one instance, Sargent inadvertently underbid the designated low bidder for a job at Fairless Hills. As a result, a meeting was immediately held to resolve the matter and to determine whether Sargent could still be "counted in." The district court found that "[t]he parties recognized that if Sargent could no longer be trusted, agreements could not be reached on *any* contract Sargent was a party to, both at the Fairless works and at the Western Pa. works." App. at 192-93 (emphasis added). The district court thus found that, before bid-rigging could continue at any location at which Sargent was a bidder, Sargent's co-conspira-

tors had to be reassured of its reliability. If bid-rigging had ceased at both Fairless Hills and the Western Pennsylvania plants because of Sargent's lapse, even contractors not qualified to bid at Fairless Hills, where the incident occurred, would have been affected adversely.

The second indication of reciprocity that the district court found to have taken place involved an occurrence when Tri-City Electric Company, a contractor who bid at Fairless Hills and the Western Pennsylvania Works, was denied the position of designated low bidder for a project at one location, and in response, withdrew from the bid-rigging at both locations. Again, the relations of the conspirators at one plant affected those at the other plants, regardless of whether they were qualified to bid at the first plant. On these facts, the district court could reasonably have found, as it did, that the bid-rigging practiced at the various locations was interdependent, and that the success of each instance of bid-rigging depended to some extent upon the success of the bid-rigging elsewhere. Thus, although all the conspirators did not directly compete with one another for each job at each location, the district court reasonably determined that they all did share a common, continuing objective to rig bids, and that each was benefited by the continued successful rigging of bids, at all locations.

Furthermore, the district court found that, despite the target companies' policy of maintaining selected bidders' lists, all conspirators were *potential* competitors. It reasoned that the contractors "were all available and capable of being added to the bid list at each facility," and that if "added to the list, they would then [have been] eligible to bid for jobs." App. at 194. Judge Gibbons rejects this finding, stating that there was no potential for competition where an unqualified bidder could not "by some action within its own control or the control of the other alleged conspirators" have its name placed on a selected bidders' list. Ante at 1129.

The linchpin of Judge Gibbons' reasoning is that because inclusion on the bidders' lists was controlled by the target corporations rather than by the conspirators, a finding that the conspirators were potential competitors is foreclosed as a

matter of law or is clearly erroneous. There was evidence that the make-up of the lists fluctuated over the period of the conspiracy. These variations in the bidders' lists raised the possibility that contractors who had been excluded from the bidding at a given location might be added to the list, and thereby become qualified to bid. Under these circumstances, a conspirator could be said to be a potential competitor at all locations at which it was physically able to provide its services. *Cf. Ashland-Warren*, 537 F. Supp. at 443. And, perhaps more importantly, each conspirator would have an additional purpose in encouraging continued bid-rigging at all locations because of the possibility that a change in the bidders' list of one of the target companies might make the contractor eligible to bid, and thus to rig bids, at that target's facility.

B.

Because I disagree with Judge Gibbons' conclusion that the district court's finding of a single conspiracy was reached under an erroneous application of principles of antitrust law, it remains to address the question whether the district court improperly concluded that the evidence established a violation of defendants' double jeopardy rights. As Judge Gibbons concedes, since defendants made a nonfrivolous showing that their double jeopardy rights were infringed by the indictment at issue, the government bore the burden of proving by a preponderance of the evidence that the indictment was not based upon the same offense for which defendants had already been indicted and sentenced. *See United States v. Felton*, 753 F.2d 276, 278 (3d Cir. 1985); *United States v. Inmon*, 568 F.2d 326, 332 (3d Cir. 1977) (*Inmon I*). It is also conceded that we may reject the district court's findings of historical fact only if clearly erroneous, and that we must affirm the district court's finding of a single conspiracy unless the "inference of a single conspiracy was on this record clearly erroneous as a matter of fact or legally impermissible." Ante at 1126; *see Felton*, 753 F.2d at 278; *Inmon I*, 568 F.2d at 332.

This Court has adopted the "same evidence" test for assessing double jeopardy claims. *See United States v. Young*, 503 F.2d 1072, 1076 (3d Cir. 1974). Under this test, a second indictment for an offense violates the double jeopardy clause "only when the evidence required to support a conviction upon [the offense] would have been sufficient to warrant a conviction upon" a prior indictment. *Id.* at 1075 (quoting *United States v. Pacelli*, 470 F.2d 67,72 (2d Cir. 1972)). However, *Young* cautioned that application of the same evidence test "must be tempered . . . with the consideration that a single conspiracy may not be subdivided arbitrarily for the purposes of prosecution." *Id.* As we explained there, "[d]ifferent alleged overt acts are not necessarily inconsistent with an improper division of a single conspiracy into multiple crimes. It is the agreement which constitutes the crime, not the overt acts." *Id.* at 1076. *See also Felton*, 753 F.2d at 278.

Other courts, noting the difficulties of applying the same evidence test in assessing claims that a second indictment on a charge of conspiracy violates the double jeopardy clause, have adopted a "totality of the circumstances" standard. *See, e.g., Korfant*, 771 F.2d at 662; *United States v. Thomas*, 759 F.2d 659, 661-62 (8th Cir. 1985); *United States v. Sinito*, 723 F.2d 1250, 1256 (6th Cir. 1983); *cert. denied*, ____ U.S. ____, 105 S. Ct. 86, 83 L.Ed.2d 33 (1984); *United States v. Castro*, 629 F.2d 456, 461 (7th Cir. 1980); *United States v. Marable*, 578 F.2d 151, 154 (5th Cir. 1978). Under the totality of the circumstances approach, a court will consider the degree of overlap between the two charged conspiracies in the following factors: (1) the criminal offenses charged in the successive indictments; (2) the participants; (3) the time periods involved; (4) similarity of operation; (5) the overt acts alleged; (6) the geographic scope of the alleged conspiracies or locations where overt acts occurred; and (7) the objectives of the alleged conspiracies. Additionally, it will look to whether any other signs of interdependence between the two charged conspiracies exist. *See Korfant*, 771 F.2d at 662; *Thomas*, 759 F.2d at 661-62. The ultimate question under the totality of the circumstances ap-

proach, as under the same evidence test, is "whether there [was] more than one agreement." *Sinito*, 723 F.2d at 1256. *See also Beachner Construction Co.*, 729 F.2d at 1281 (bid-rigging case); *Braverman v. United States*, 317 U.S. 49, 53, 63 S.Ct. 99, 101, 87 L.Ed. 23 (1942) ("The gist of the crime of conspiracy is the agreement."); *Young*, 503 F.2d at 1076.

Although this Court has thus far declined expressly to adopt the totality of the circumstances approach, *Felton*, 753 F.2d at 281, it has followed that approach in practice, *see id.* at 278-81; *United States v. Inmon*, 594 F.2d 352, 353-54 (3d Cir.), *cert. denied*, 444 U.S. 859, 100 S.Ct. 121, 62 L.Ed.2d 79 (1979) (*Inmon II*). And it would appear that consideration of all relevant facts is necessary to a determination whether two charged offenses are "in law and in fact the same offense." *Young*, 503 F.2d at 1075 (citing *United States v. Ewell*, 383 U.S. 116, 124-25, 86 S.Ct. 773, 778, 15 L.Ed.2d 627 (1966)). I therefore believe that the district court properly considered all relevant circumstances in determining that the government had failed to carry its burden of establishing by a preponderance of the evidence that the Fairless Hills bid-rigging and that conducted at Gulf Oil and in Western Pennsylvania were the subjects of separate conspiracies rather than one over-arching conspiracy.

As the district court observed, the time spans of the three bid-rigging schemes charged overlapped "for a substantial part of the period between 1971 and 1981," and "[t]he arrangements at each facility ended at approximately the same time." App. at 187. It also found that, to the extent that the arrangements at each facility ended at different times, they did so because work was drying up at the different locations at different times, an event over which the conspirators had no control. Thus, any variance in the termination dates of the bid-rigging at the different plants did not indicate a lack of interdependence among the arrangements.

The district court further noted that the participants at the different facilities overlapped substantially. The overlap is even more extensive when one considers Fischbach & Moore and

Pangborne, its subsidiary, as one participant.[4] The court dismissed the government's argument that not all participants were active in every area of the conspiracy and that not all participants knew each other by correctly pointing out that members of a conspiracy need not know or have direct contact with each other. App. at 188; *Blumenthal v. United States*, 332 U.S. 539, 550, 68 S.Ct. 248, 253, 92 L.Ed. 154 (1947); *United States v. Consolidated Packaging Corp.*, 575 F.2d 117, 127 (7th Cir. 1978). It stated that:

> In accordance with the operating agreement in place here, there was no need to inform every member about every action taken in furtherance of the conspiracy. The only time it was necessary for a contractor to know of bid-rigging activities on a particular project was when it was on the bid list for that project. A single conspiracy may be made up of a small group of core conspirators who interact with different sub groups at different times to achieve an overall plan. *United States v. Boyd*, 595 F.2d 120 (3d Cir. 1978). This is what occurred here. The core group, made up of Sargent Electric, Lord Electric, Foley, Ortlip and Fischback [sic] and Moore with its subsidiary Pangborne, conspired together and with different sub groups to eliminate competitive bidding in each location at which members of the conspiracy bid. The agreement was not limited to the Fairless works or the Western Pa. works or the Gulf refinery, it extended to every facility where bidders on a project were members of the conspiracy. Whenever a new bidder was added at a facility, the contractor simply plugged into that aspect of the conspiracy.

App. at 189.

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4 The Supreme Court recently held that "the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S. Ct. 2731, 2742, 81 L.Ed.2d 628 (1984).

Judge Gibbons' opinion states that it is "undisputed . . . that the Foley Co. did not rig bids at Western Works or at Lukens Steel while it participated in bid-rigging at Gulf's Philadelphia refinery and at Fairless Hills," and that "while Lord rigged bids at Western Works and at Fairless Hills, it did not do so at Lukens Steel." Ante at 1130. The first of these assertions is clearly disputed: as the government concedes, and the record indicates, the Foley Company did rig bids at the Western Pennsylvania facilities. *See* Brief for Appellant at 6 n.11. Furthermore, although it is true that Foley did not rig bids on the intermittent occasions when it was invited to submit bids at Lukens Steel, the district court explained that there was no evidence that the bid-rigging had spread to the Lukens Steel plant at the time Foley bid competitively. App. at 191.

As for Lord's nonparticipation at Lukens Steel, Lord only bid at that facility once or twice in the early 1970's, both times through a general contractor, and there is no evidence as to the identities of the other bidders on those occasions. App. at 925, 1003. Again, in the face of Lord's admitted participation in the bid-rigging at Fairless Hills and the Western Pennsylvania facilities, where it was regularly included on the bidders' lists, its failure to rig one or two bids, submitted through a general contractor, at Lukens Steel is not sufficient to satisfy the government's burden of proof.

Judge Gibbons also stresses that separate records were kept of the allocation of jobs at each facility, and that the meetings at which the designated low bidders were chosen were held at a different location for each facility. But as the district court explained, these were merely adaptations of the common practice which were necessitated by the individual characteristics of the different target companies. Only Gulf Oil consistently used the same list of selected bidders, so only there could a regular rotation be used to allocate jobs. At the other facilities, the conspirators tried to apportion the work fairly "based upon the value of the contract and who had been awarded the previous contracts, with a variation in the order of rotation available 'if someone needed the work.' " App. at 174.

And surely the fact that the meetings to allocate jobs were held at locations convenient to the area participants is of little help to the government in establishing the existence of multiple conspiracies. In short, on this record the district court reasonably could have concluded that there was a single bid-rigging conspiracy that encompassed the activities at Fairless Hills, which underlie the indictment at issue, and the activities at the Western Pennsylvania facilities and Gulf Oil, for which defendants have already been sentenced.

Judge Stapleton in his concurring opinion concludes that "the district court's finding of an overarching conspiracy is clearly erroneous." Ante at 1132. He argues that the record "either strongly favors or is consistent with a finding of multiple conspiracies," *id.*, and that the facts relied upon by the trial court "do not provide unambiguous evidence of an overarching conspiracy." *Id.* at 1133. I do not disagree that the record might support an inference that multiple conspiracies existed. That, however, is beside the point. The government bore the burden of proving the existence of multiple conspiracies, and thus the absence of a double jeopardy violation, by a preponderance of the evidence. *See Felton*, 753 F.2d at 278; *Inmon I*, 568 F.2d at 332. Where the record might reasonably support either the inference of multiple conspiracies or the inference of a single conspiracy, and the government had the burden of proving individual and separate conspiracies, it cannot be said that the district court was clearly erroneous in concluding that the burden was not sustained. The district court, sitting as the finder of fact, concluded after a full hearing at which witnesses testified regarding the nature of the conspiracy, that defendants' activities were carried on pursuant to a single all-encompassing conspiracy. As the Supreme Court has recently emphasized,

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two

> permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Anderson v. City of Bessemer City, ____ U.S. ____, 105 S. Ct. 1504, 1512, 84 L.Ed.2d 518 (1985).

The district court's view of the evidence surely is a plausible one. Furthermore, it is especially inappropriate to disturb the district court's finding where, as here, that finding is consonant with protection of defendants' constitutional rights. I would therefore hold that the district court did not err in dismissing the indictment on the ground that it infringed defendants' double jeopardy rights.

III.

It is essential to emphasize that this is a case of constitutional dimensions. The policies underlying the double jeopardy clause are fundamental to our system of justice. As the Supreme Court has declared, "[W]hen a defendant has been once convicted and punished for a particular crime, principles of fairness and finality require that he not be subjected to the possibility of further punishment by being again tried or sentenced for the same offense." *Wilson*, 420 U.S. at 343, 95 S.Ct. at 1021. In the present case, each of the defendants has already been indicted and sentenced for participating in virtually identical criminal activities to those charged in the indictment that initiated this prosecution. I would hold that principles of fairness and finality militate against allowing defendants to be placed in jeopardy a second time.

Because I believe that the antitrust principles applied in the opinion announcing the judgment of the Court are not applicable in this case, and disagree as to the evaluation of the evidence and the weight to be assigned to certain portions of the evidence, I would affirm the district court order dismissing the indictment.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL ACTION

Nos. 84-00313-01, 84-00313-02, 84-00313-03, 84-00313-04

UNITED STATES OF AMERICA

—v.—

SARGENT ELECTRIC COMPANY, LORD ELECTRIC COMPANY, W.V. PANGBORNE & CO., INC., J.A. BRUCE PINNEY

MEMORANDUM OF DECISION—March 26, 1985

MCGLYNN, J.

In an indictment returned by the Grand Jury in this District on July 19, 1984, the defendants were charged with conspiracy to violate Section One of the Sherman Act 15 U.S.C. § 1. The defendants Sargent Electric Co. and Lord Electric Company were convicted and sentenced for a violation of the same statute in the Western District of Pennsylvania. *United States v. Fischbach & Moore, Inc., et al.*, 750 F.2d 1183 (3d Cir.), *cert. denied*, 105 S. Ct. 1397 (1985). The defendants W.V. Pangborne & Co., Inc. and J.A. Bruce Pinney pled nolo contendre [*sic*] and were sentenced on a prior indictment in this district also charging a conspiracy to violate 15 U.S.C. § 1. *United States v. W.V. Pangborne and Co., et al.*, Cr. No. 84-105 (E.D. Pa.).

Presently before the court are motions by all defendants to dismiss the indictment on the grounds of double jeopardy. After a hearing held on November 13, 1984, the court con-

cluded that the defendants had made a prima facia [*sic*] showing of double jeopardy, and, thereafter, an evidentiary hearing was conducted. Based on the evidence educed [*sic*] at that hearing, for the reasons stated below, the defendants' motions will be granted.

FACTS

United States Steel Corporation ("U.S. Steel") operates a plant in Fairless Hills, Pennsylvania ("the Fairless works") and several plants in western Pennsylvania ("the western Pa. works"). From time to time during the 1970's, U.S. Steel awarded contracts to electrical contractors for projects to be performed at either the Fairless works or the Western Pa. works. It awarded these contracts through the solicitation of bids. U.S. Steel required 2 bids to be submitted on each project, an initial bid and then a "firm and final" bid. The project was awarded to the contractor with the lowest firm and final bid.

The only electrical contractors who could bid were those contractors U.S. Steel invited to bid on that particular project. U.S. Steel selected contractors to be on a bid list on the basis of their past performance, capability, stability and whether the contractor was located in the general area. After the invitations to bid were sent out, a site visit was arranged so that the bidding contractors could see the construction site and learn more about the project. All bidders on a project were invited to the same site visit and therefore knew the identity of the other bidders on any particular project.

Both the Fairless works and the Western Pa. works had a group of core bidders. These bidders were invited to bid on projects at that facility on a regular basis. While the core bidders were not always on the bid lists, they were included more often than other contractors. The Western Pa. works' core bidders were Sargent Electric Company ("Sargent Electric"), Lord Electric Company, Inc. ("Lord Electric"), and Fischback [*sic*] and Moore, Inc. ("Fischback [*sic*] and Moore"). The Fairless works' core bidders were Sargent Elec-

tric, Lord Electric, W.V. Pangborne & Co., Inc. ("Pangborne"), and to a lesser extent, The Howard P. Foley Company ("Foley") and the Harry F. Ortlip Company ("Ortlip"). Fischback [*sic*] and Moore did not bid at the Fairless works because Pangborne, its wholly owned subsidiary, bid the jobs in the Philadelphia area.

Gulf Oil Corporation ("Gulf"), Sun Oil Company ("Sun"), Arco and Lukens Steel Corporation ("Lukens") all operated plants near Philadelphia, Pennsylvania. Like U.S. Steel, they also solicited bids for projects at their respective plants from certain electrical contractors. Again, only those contractors whose name appeared on the bid list for a project could bid. At Sun, electrical contractors could bid not only to Sun itself, but, on occasion to general contractors who were competing for jobs at Sun. However, in order to bid to a general contractor at Sun, the electrical contractor had to be among those included on Sun's regular bid list.

Gulf, Arco, Lukens and Sun, unlike U.S. Steel, only required bidders to submit one bid price. Two bids, however, were necessary when bidding to a general contractor, due to the general contractors' usual practice of shopping around for the lowest bid.

A pre-bid site meeting, similar to those at U.S. Steel, would be held for each project at these plants. All bidders who were on the bid list for that project were invited to the same site meeting. Therefore, again, all bidders on each project were aware of the identity of the other bidders.

These companies usually invited the same contractors to bid on each of their projects. While occasionally another bidder would be added, there was much less variation than on the U.S. Steel bid lists. Gulf Oil's bid list usually included Pangborne, H.B. Frazer Company ("Frazer"), Foley, Ortlip and Cates & Shepherd, Inc. ("Cates & Shepherd").[1] Sun Oil's bid list usually included Ortlip Co., Frazer and Progressive Electric. In 1977, Foley was added to Sun Oil's bid list and in 1979, Pangborne was added. The bidders on Arco's bid list

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1 Cates & Shepherd did not bid on Gulf Projects after 1977.

were Foley, Riggs-Distler, Henkels & McCoy, Ortlip and Pangborne. The bidders on Lukens' bid list were Ortlip, Pangborne and Henkels & McCoy, and sometimes Frazer and Foley. Each of the companies requesting bids controlled the names of the electrical contractors on its particular list.

The electrical contractors at the Fairless works, the Western Pa. works, Sun Oil, Gulf, Lukens and Arco engaged in bid rigging in connection with the electrical construction projects at those facilities. Bid rigging was occurring as early as 1967 at the Western Pa. works, and at least by 1970 at the Fairless works. Bid rigging occurred at Gulf in the early 1970's when Gulf began putting contracts out for bid. It was also occurring at Sun and Arco at least by the early 1970's and began at Lukens in 1977.

The bid rigging at each facility was arranged in the same general fashion. The identity of the contractors on the bid list was revealed at the site visit; then if all the firms on the bid list for that project were members of the bid rigging conspiracy, a meeting of the bidders would be arranged.[2] One of the contractors on the bid list would telephone the others and arrange a time and day for the meeting. If a contractor could not attend the meeting, his part of the bid rigging would be arranged by phone. Only the contractors on the bid list for that project would attend the meeting. If a contractor was not on the bid list for a particular project, the contractor would not even be informed that a meeting was to take place.

The bid rigging meetings were held in locations which were convenient to the bid riggers involved. The Western Pa. works meetings were held in the Duquesne Club in downtown Pittsburgh. The Fairless meetings were held at the Philadelphia Airport Motel since some bidders had to fly in from Pittsburgh for the meetings. The Gulf, Sun and Arco meetings were held at the National Electrical Contractors Assoc. (NECA) office in downtown Philadelphia while the Lukens meetings were held

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2 Occasionally, however, the conspirators would not bother to hold a meeting because the project was too small.

at the Valley Forge Hilton which was the most convenient location for the 3 major participants.

At the meetings, the parties decided among themselves who the low bidder would be for that particular project. The bid each contractor was to submit on the project was determined either during or after the meeting. The jobs were allocated among the participants so that each contractor on the bid list would receive a fair share of the projects let by the particular facility. Allocation of the Arco and Sun bids was easy to accomplish because the same bidders appeared on each bid list. Therefore, a rotation system was used; one rotation for jobs over a certain amount, another for jobs under that amount. In the other bid systems, allocation was more difficult because some contractors would appear on the bid [list] less frequently and even the core bidders were not on every bid list. Therefore, there could be only a rough allocation of the projects among the bidders according to value. Although strict rotation was not possible, the participants divided the work among themselves based upon the value of the contract and who had been awarded the previous contracts, with a variation in the order of rotation available "if someone needed the work."

The members of the conspiracy kept records concerning how the jobs were allocated. Separate records were kept for each facility. There was no bookkeeping system for the conspiracy as a whole. Individual conspirators kept these records simply to ensure that they received their "fair share" of the jobs. The records did not include the result of every bid rigging meeting because in some instances the conspirator who kept the records did not attend.

Even on projects which were not the targets of the bid rigging conspiracy contractors in every location accommodated each other with "complementary bids," that is, a contractor who did not want the job but who wanted to maintain his position on the bid list would request one of the bidders to supply a number to submit which, of course, would be larger than the bid which would be submitted by the bidding contractor. In this way, a contractor could bid on the job and avoid the possibility of being cut from the bid list and yet be sure of not

winning the contract. Complementary bids could occur when all the companies on the bid list were conspirators and even when some were not.

There were also certain terms used by the contractors that were generally understood by the conspirators to refer to different aspects of bid rigging. To ask for "support" on a project was to request that your company be the low bidder on a project, conversely, to "give support" meant to allow another company to be the low bidder. Asking to "borrow a number" meant to request a "complimentary [sic] bid" from another contractor. The phrase "designated hitter" was used by at least one co-conspirator to identify the company which had been chosen to be the low bidder on a particular project and was so understood by others. While each participant did not always use these terms, the participants were aware they related to bid rigging.

Based on the allegations of the several indictments and the evidence educed [*sic*] at the hearing, the relationship of the companies and individuals to the facilities where bids were rigged is illustrated by the following schedule.

	WESTERN PA.	*FAIRLESS*	*GULF*	*SUN*	*ARCO*	*LUKENS*
	W.D.Pa. Cr.No. 83-098	*E.D.Pa. Cr.No. 84-313*	*E.D.Pa. Cr.No. 83-263 84-105*	*E.D.Pa. Cr.No. 83-262*		
A. Neri, Inc.		B				
Frederick Tesarck		B				
Ralph Neri		B				
Broadway Maintenance	B					
Burlington Electric		B				
Cates & Shepherd			B			
Fred Hayn			B			
David W. Murray Co.		B				
Fischbach & Moore Co.	A					
Clark Andrews	C					
Donald Paul	C					
Arnold Pine	B					
Nate Small	B					

	WESTERN PA.	*FAIRLESS*	*GULF*	*SUN*	*ARCO*	*LUKENS*
	W.D.Pa. Cr.No. 83-098	*E.D.Pa. Cr.No. 84-313*	*E.D.Pa. Cr.No. 83-263 84-105*	*E.D.Pa. Cr.No. 83-262*		
Foley Co.	A	B	B	B	B	B
Herbert Geuther		B	B	B	B	B
Mr. Kleinhoff	B	B				
Joseph Rodgers	B					
Frazer Co.			B	A		B
Edward Frazer, Sr.				B		
W. Edward Frazer, Jr.			B	A		B
William Gosewisch			B	B		
Fuelgraff Electric Co.	C					
Charles Fuelgraff	C					
Henkles & McCoy					B	B
Jack Kurtz					B	B
Harry Linn					B	B
L.K. Comstock	C					
Sam Valeriano	C					
Lord Electric	A	A				
Paul Arbogast	A	B				
Richard Perrott	C	B				
Meade Electric Co.	C					
Joseph Lizzardo	C					
Henry Therrien	C					
Ortlip Co.		B	A	B	B	B
Alfred Petony [*sic*; should read "Pentony"]		B	B	B	B	B
Pangborne		A	A	B	B	B
J.A. Bruce Pinney		A	A	B	B	B
Progressive Electric				B		
Philip Kamen				B		
Riggs-Distler					B	
Walter Simpson					B	
John B. Spang					B	
Sargent Electric	A	A				
John Griffin	B					
Edward Sargent	C					
Frederick Sargent	A	B				
Ralph Vryenhoek	A	B				

	WESTERN PA.	*FAIRLESS*	*GULF*	*SUN*	*ARCO*	*LUKENS*
	W.D.Pa. Cr.No. 83-098	*E.D.Pa. Cr.No. 84-313*	*E.D.Pa. Cr.No. 83-263 84-105*	*E.D.Pa. Cr.No. 83-262*		
Tico Electric	C					
William Maley	C					
Tri-City Electric	A*	B				
Claire Oesterle	C	B				
James Oesterle	A*					
Clayton Shackelford	C					

A = indicted co-conspirator
B = unindicted, unnamed participants as determined from the evidence
C = named but unindicted co-conspirator
* = Acquitted

Because of the difference in the bid lists no one participant was active at all locations at all times. In addition, there were some late joiners and early defectors. For example, Meade Electric Co. did not join until 1978 and Riggs-Distler joined in 1981. When an electrical contractor who was known to engage in bid rigging was added to the bid list at a particular plant, it would be approached by the contractors who were already rigging bids and asked to join. There was no fear or hesitation in approaching the new contractor. The new member would simply attend the meeting and carry out the agreed plan. It would be "business as usual." On those occasions when a contractor would be dropped from the list for a period of time it would not participate in the scheme. If, later, it was put back on the list it would resume its conspiratorial activities.

Tri-City withdrew when its request to be the low bidder on a Fairless project was rejected by the co-conspirators. Thereafter, Tri-City refused to participate in any further collusive bidding either at the Fairless works or the Western Pennsylvania works. In 1980, Foley stopped rigging bids in Pittsburgh because a co-conspirator submitted a lower bid on a job that Foley was supposed to receive. Foley continued to rig bids at the other locations, however, because the district manager of the Philadelphia office was not aware that his company was

rigging bids at the Western Pa. works. A Foley vice-president had participated in bid rigging in both areas before he retired the previous year.

Except for the Foley incident, cooperation at one facility meant cooperation at all facilities for all conspirators who were common to more than one bid list. For example, when Frazer was added to the bid list at Lukens and it cooperated with the conspirators there even though it was never selected to be low bidder among the four on the list.

In most companies, the same individuals handled the bid rigging regardless of the location or the facility involved.

On one occasion, Ortlip was designated to be the low bidder on a project at the Fairless works. Sargent Electric submitted a lower bid and was awarded the job. As a result of this, a meeting was held at the Sheraton Airport Hotel in Pittsburgh. Present at the meeting were Frederick Sargent of Sargent Electric, Alfred Pe[n]tony of Ortlip, Herbert Geuther of Foley and J.A. Bruce Pinney of Pangborne, and possibly others. Mr. Sargent apologized for the mistake and explained that it was unintentional. It was determined that Sargent Electric would lose a turn in the allocation at Fairless.

The evidence shows that there were only two exceptions to the general rule that collusive bidding would occur whenever a bid list contained only conspirators. When Foley was added to the Lukens bid list in 1977, on one occasion they bid competitively on a project worth over $100,000. The other exception involved an Ortlip subsidiary in Pittsburgh called Ortlip Electrical Construction. Three Western Pa. projects were bid competitively because the members of the conspiracy did not feel that Ortlip's Pittsburgh manager, who was a 17% owner of the subsidiary, could be trusted. The bid rigging at all other locations was handled by Alfred Pe[n]tony, president of Ortlip.

In 1981, contractors who bid Western Pennsylvania jobs met and agreed that due to the poor economic conditions and the small number of jobs which were available, bid rigging in that area would be suspended. Bid rigging stopped at the Fairless works in 1981 when U.S. Steel stopped awarding contracts through the bidding process. The arrangement at Sun Oil came

to an end in 1981 when the representative of Progressive, a core bidder, decided that he would no longer rig bids. Bid rigging continued at Gulf until 1982 when the lack of work and the threat of a grand jury investigation finally brought it to an end.

On July 1, 1983, an indictment was returned in the United States District Court, Western District of Pennsylvania ("Pittsburgh indictment") against the defendants Lord Electric and Sargent Electric among others. This indictment charged them with violations of Section One of the Sherman Act by conspiring to rig bids for electric work at the Western Pennsylvania works of U.S. Steel. The overt acts charged were:

> (a) discussing by telephone and at meetings at the Duquesne Club in Pittsburgh, Pennsylvania, the preparation and submission of prospective bids for electrical construction projects at the Western Pennsylvania Works of U.S. S[teel];
>
> (b) designating a firm from among the corporated [*sic*] defendants and co-conspirators as low bidder on electrical construction projects at the Western Pennsylvania Works of U.S. S[teel];
>
> (c) agreeing among themselves on the price, or approximate price, at which bids would be submitted for electrical construction projects at the Western Pennsylvania Works of U.S. S[teel]; and
>
> (d) submitting noncompetitive, collusive, complementary and rigged bids, or refraining from bidding, on electrical construction projects at the Western Pennsylvania Works of U.S. S[teel].

The Pittsburgh indictment proceeded to trial and on April 20, 1984, a jury verdict was rendered finding the defendants Lord Electric, Sargent Electric and others guilty.[3] Sentences were imposed and the judgments of sentence were affirmed. *United*

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3 Tri-City Electric Company and James Oesterle were acquitted.

States v. Fischbach & Moore, Inc., 750 F.2d 1183 (3rd Cir. 1984).

In July, 1984, an indictment was returned in the United States District Court for the Eastern District of Pennsylvania against the defendants Pangborne and J.A. Bruce Pinney. This indictment charged the defendants with violating Section One of the Sherman Act by conspiring to rig bids for electric work at Gulf Oil. The overt acts charged were:

> (a) attending meetings at the Philadelphia, Pennsylvania offices of the Penn-Del Jersey Chapter of the National Electrical Contractors Association and other places to discuss various prospective lump sum bid electrical construction projects at the Gulf Philadelphia refinery and the bids to be submitted therefor;
>
> (b) telephoning and otherwise contacting one another to discuss various prospective lump sum bid electrical construction projects at the Gulf Philadelphia refinery and the bids to be submitted therefor;
>
> (c) designating among themselves the low bidder on various lump sum bid electrical construction projects at the Gulf Philadelphia refinery;
>
> (d) agreeing among themselves on the prices, or approximate prices, at which bids would be submitted for various lump sum bid electrical construction projects at the Gulf Philadelphia refinery; and
>
> (e) submitting noncompetitive, collusive, complementary and rigged bids, or refraining from bidding, on various lump sum bid electrical construction projects at the Gulf Philadelphia refinery.

Both defendants entered pleas of *nolo contendere* on June 5, 1984 and have been sentenced.

The defendants in the case *sub judice* were indicted on July 19, 1984 and charged with a violation of Section One of the Sherman Act by conspiring to rig bids for electric work at the Fairless works of U.S. Steel. The overt acts charged were:

(a) attending meetings at the Philadelphia Airport Motel (later known as the Best Western Philadelphia Airport Inn) and other places to discuss various prospective electrical construction projects at the U.S. Steel Fairless Works and the bids to be submitted therefor;

(b) telephoning and otherwise contacting one another to discuss various prospective electrical construction projects at the U.S. Steel Fairless Works;

(c) designating among themselves the low bidder on various electrical construction projects at the U.S. Steel Fairless Works;

(d) agreeing among themselves on the prices, or approximate prices, at which bids would be submitted for various electrical construction projects at the U.S. Steel Fairless Works; and

(e) submitting noncompetitive, collusive, complementary and rigged bids, or refraining from bidding, on various electrical construction projects at the U.S. Steel Fairless Works.

DISCUSSION

The Fifth Amendment prohibits placing a person in jeopardy of life or limb twice for the same offense. To establish a valid claim of double jeopardy it is not enough that the two offenses charged "arise out of the same general course of conduct" *United States v. Young*, 503 F.2d 1072, 1075 (3d Cir. 1974). It is necessary that they be the same offense both in law and in fact. *United States v. Ewell*, 383 U.S. 116, 124 (1966). The defendant bears the burden of presenting a nonfrivolous double jeopardy claim. When this has been established, as here, the burden of proof shifts. The government must then prove by a preponderance of the evidence that there are two separate conspiracies. *United States v. Inmon*, 568 F.2d 326 (3d Cir. 1977), *cert. denied*, 444 U.S. 859 (1979), *appeal after remand*, 594 F.2d 352 (3d Cir. 1979).

The traditional test in a double jeopardy inquiry is the "same evidence" test. This test establishes that offenses are the "same" under a double jeopardy analysis when "the evidence required to support a conviction upon one of [the indictments] would have been sufficient to warrant a conviction upon the other." *United States v. Pacelli*, 470 F.2d 67, 72 (2d Cir. 1972), *cert. denied*, 410 U.S. 983 (1973). In this case, all three indictments allege violations of Section One of the Sherman Act, 15 U.S.C. § 1, through bid rigging. The overt acts alleged in all three indictments are: discussion of prospective electrical projects and bids, both through meetings and telephone conversations; designation of a low bidder; agreement as to the price at which bids would be submitted; and the submission of non-competitive, collusive, complementary and rigged bids. The only difference in the indictments concerns where the work was to take place; whether at the Fairless works, the Western Pennsylvania Works or the Gulf refinery.

The government, arguing three separate conspiracies, points out that proof that bid rigging occurred at the Western Pennsylvania Works does not establish that it occurred at the Fairless works or at the Gulf refinery. While it is true that where there is evidence in support of one indictment which would not support a conviction on another suggests that there are two conspiracies under the same evidence test, the Third Circuit along with other circuits, has ruled that this test "must be tempered . . . with the consideration that a single conspiracy may not be subdivided arbitrarily for the purposes of prosecution." *United States v. Young*, 503 F.2d at 1075; *United States v. Booth*, 673 F.2d 27 (1st Cir.), *cert. denied*, 456 U.S. 978 (1982); *United States v. Papa*, 533 F.2d 815 (2d Cir.), *cert. denied*, 429 U.S. 961 (1976); *United States v. Sinito*, 723 F.2d 1250 (6th Cir. 1983), *cert. denied*, 105 S.Ct. 86 (1985). "[S]imply comparing different overt acts in the indictment does not accurately determine the issue." *Id.* at 1258. A single conspiracy may be improperly divided into multiple crimes through alleging different overt acts in the indictment. "It is the agreement which constitutes the crime not the overt acts." *United States v. Young*, 503 F.2d at 1076. Therefore, the entire

agreement among the parties must be examined to determine if there are separate conspiracies or a single conspiracy.

An agreement is the matrix of any conspiracy. It does not have to be formal or expressed. It may simply be implied or inferred from the actions of the parties. *United States v. Consolidated Pack[ag]ing [Corp.]*, 575 F.2d 117 (7th Cir. 1978). The court must, therefore, examine the evidence to determine whether it demonstrates a single agreement encompassing all the parties to the various projects or multiple conspiracies limited to particular facilities and participants.

One consideration is an overlap in the time periods involved. *United States v. Felton*, 753 F.2d 276, 278 (3d Cir. 1985). If the time periods are not similar, it leads to the inference that there is more than one conspiracy. It is indisputable in this case that the time periods are basically congruent.

It is not clear from this record precisely when bid rigging began at each of the several facilities, but it is clear that bid rigging was taking place at all facilities for a substantial part of the period between 1971 and 1981.

The arrangements at each facility ended at approximately the same time. It ended at the Western Pa. works because there were not enough jobs to go around. It ended at the Fairless works because jobs were no longer put out for bids. These were events over which the conspirators had no control. The fact that the conspirators continued at Gulf until 1982 demonstrates only that economic conditions were better at Gulf; it doesn't show a separate agreement. While the common time frame is not conclusive, *United States v. Inmon*, 594 F.2d at 354, it does support an inference of a single conspiracy.

Another indication is the personnel involved in the bid rigging at each facility. *United States v. Felton*, 753 F.2d at 279. Of the six corporate defendants in the Pittsburgh indictment, five are named defendants or unindicted co-conspirators in the present case. In the Gulf case Pangborne and J.A. Bruce Pinney, Executive Vice President and General Manager of Pangborne, were the only named defendants, and both are defendants in the present case. Also, of the four unindicted

corporate co-conspirators in Gulf, two are unindicted co-conspirators in the present case.

The one corporate defendant in the Western Pa. indictment which was not indicted in the present case is Fischback [*sic*] and Moore, but Fischback [*sic*] and Moore is represented in the Fairless indictment by its wholly owned subsidiary, the defendant Pangborne.

The government puts much emphasis on the fact that not all participants were active in every area of the conspiracy and that not all participants knew each other. However, members of a single conspiracy do not have to know or have direct contact with each other. *Blumenthal v. United States*, 332 U.S 539 (1947). In accordance with the operating agreement in place here, there was no need to inform every member about every action taken in furtherance of the conspiracy. The only time it was necessary for a contractor to know of bid rigging activities on a particular project was when it was on the bid list for that project.

A single conspiracy may be made up of a small group of core conspirators who interact with different sub groups at different times to achieve an overall plan. *United States v. Boyd*, 595 F.2d 120 (3d Cir. 1978). This is what occurred here. The core group, made up of Sargent Electric, Lord Electric, Foley, Ortlip and Fischback [*sic*] and Moore with its subsidiary Pangborne, conspired together and with different sub groups to eliminate competitive bidding in each location at which members of the conspiracy bid. The agreement was not limited to the Fairless works or the Western Pa. works or the Gulf refinery; it extended to every facility where bidders on a project were members of the conspiracy. Whenever a new bidder was added at a facility, the contractor simply plugged into that aspect of the conspiracy.

The government points out that although Ortlip was on the bidders' list in Western Pa., three times in the 1970's the company did not rig bids at that location. That aberration is explained by the conspirators' distrust of Ortlip's manager and part owner of the Pittsburgh subsidiary. The government argues that if there had been one conspiracy, the Western

subsidiary would have been forced into the conspiracy by the parent company. This argument is unpersuasive because it assumes that a person under these circumstances can be made to participate in a criminal enterprise against his will. Moreover, this argument is based on pure speculation. It is more likely that the parent did not want to risk exposure by trying to force its Pittsburgh subsidiary to cooperate in a bid rigging scheme. It should also be noted that Ortlip was invited to bid on only three out of the one hundred six (106) electrical construction projects that were put out for bids by the Western Pa. works, and one of those three was for an amount under $50,000. Thus, given the limited extent of Ortlip's opportunity to participate in Western Pennsylvania projects, there was little incentive on the part of the parent to force its subsidiary to go along with the scheme.

The government also argues that it was not an automatic plug-in conspiracy because Riggs-Distler bid competitively at the Fairless works. This is correct, but Riggs-Distler was only part of the conspiracy for one year. Before that time they refused offers to rig bids and after that time they withdrew from the conspiracy. Riggs-Distler was on the Fairless works' bid list only *before* it joined the conspiracy. The same is true of Meade Electric which was only on the Fairless bid list once, in 1974, before they began bid rigging in Pittsburgh. There is nothing inimical to the concept of a single conspiracy in the fact that a conspirator was not a party to it for the duration of the conspiracy. *United States v. Boyd*, 595 F.2d at 123.

The government also points out that Foley bid competitively on one job at Lukens which was worth over $100,000. It is difficult to determine if that occurred before or after bid rigging began at Lukens. Even assuming that the conspiracy had spread to Lukens at that time, it is possible that complementary bids were given on that project. Since there was no evidence that Foley was asked to rig and refused, it is possible that out of all the contracts which were rigged, one managed to slip by unnoticed. In any event, this one instance does not show that there were separate conspiracies or that there was not an available system whenever any firm joined the bid list.

Foley bid and rigged bids at the Fairless works, the Western Pa. works, Gulf, Sun and Arco. If Foley had been asked to rig bids at Lukens, they would have done so as part of the general understanding that when only cooperating contractors were on a restricted bid list, the bid would be rigged.

A single conspiracy can be inferred from evidence that the parties' actions were in furtherance of one common objective. *United States v. Wiltshire Oil*, 427 F.2d 969 (10th Cir.), *cert. denied*, 400 U.S. 829 (1970); *United States v. Boyd*, 595 F.2d at 120; *United States v. Varelli*, 407 F.2d 735 (7th Cir. 1969), *cert. denied*, 405 U.S. 1040 (1972). The common goal of the conspirators involved in the present action was to eliminate competitive prices whenever and wherever possible. This desire was not limited to one particular contract or one particular facility. The goal was to rig bids anywhere there was a restricted bid list with cooperating conspirators.

The government argues that since the conspirators allocated the jobs separately within each facility and not on a conspiracy-wide basis, the different aspects of the conspiracy were not interdependent. They conclude that this shows that there were separate conspiracies at each location. Allocation of jobs on a conspiracy-wide basis was not practical due to the fact that all of the contractors were not on all of the bid lists. Even core bidders for a facility were not always included. Even so, the bid rigging at each facility depended upon the success of the plans at the others. When Sargent Electric bid lower than the designated low bidder at the Fairless works, a meeting was immediately held to resolve the dispute. The parties recognized that if Sargent Electric could no longer be trusted, agreements could not be reached on any contract Sargent Electric was a party to, both at the Fairless works and at the Western Pa. works.

The parties' relationships at one facility depended upon their relationships at the others. If they could not work together and agree at one facility, they could not work together anywhere. An example of this was the occasion when Tri-City Electric Co. withdrew from the conspiracy. When Tri-City was refused the chance to be low bidder on a project, they discontinued bid

rigging both at the Fairless works and at the Western Pa. works. Although contracts were not allocated among the facilities, contractors cooperated at a facility to protect their position at the other facilities. Frazer was added to the bid list at Lukens Steel on five occasions. Each time Frazer agreed to rig the bid so that one of the three other conspirators would be the low bidder. Frazer was never designated to be the low bidder at Lukens. Frazer did this because if they could not agree at Lukens, it would alter their arrangements at all the other facilities. The companies agreed in one place so that they would be permitted to participate in another.

The government argues that this could not be the general arrangement because Foley refused to cooperate at the Western Pa. works while continuing to do so elsewhere. The reason for this was that Foley had different area managers who did not know about each other's involvement. In most companies, however, where the same individuals were responsible for the bids in all locations, bids were rigged in all locations.

The government also argues that a single conspiracy cannot be inferred under these circumstances because certain companies in the scheme never bid against each other. Since they did not bid against each other, they were not competitors and could not conspire together to remove competition. Companies did not bid against each other when they were not on the bid list for the same facilities. Invitations to bid were strictly controlled by the facility issuing the contract. The contractors could not place themselves on the bid list, nor could they attempt to compete for projects at that facility unless they were on the bid list. These contractors were competitors in that they were all available and capable of being added to the bid list of each facility. If they were added to the list, they would then be eligible to bid for jobs.

The government's reliance on *United States v. Ashland-Warren, Inc.*, 537 F. Supp. 433 (M.D. Tenn. 1982) is misplaced. In that case, the defendants were indicted separately for conspiracy to rig bids in Virginia and in Tennessee in connection with highway paving contracts involving asphalt. Due to certain physical properties, asphalt cannot be used for

paving at a site more than forty (40) miles away from where it is manufactured. While asphalt plants may be physically moved closer to the construction site, the cost is prohibitive except in unusual circumstances. The court found that the conspirators were physically and economically prohibited from competing with each other and were not even potential competitors. The court held that since there was no potential competition, the groups were incapable of agreeing to restrain trade.

In the present case, there is the potential for competition. If the contractors were added to the bid list at a facility, they would be able to compete for jobs. The contractors were not physically or economically incapable of competing for contracts, they were only prevented from doing so by the regulations at each facility. There was always the possibility that a contractor would be added to the bid list and, thus, all the contractors were potential competitors.

Another aspect that can be considered is whether the organization of the scheme indicates that there is one conspiracy. *United States v. Felton*, 753 F.2d at 280. Although not identical in every detail, the organization of the agreement at each facility follows a general pattern. U.S. Steel or one of the other companies would ask for bids on an electrical construction job. If all the bidders on the bid list were bid riggers, a meeting would be called to discuss who should be the low bidder and [who] would submit noncompetitive bids. Due to the corporate policies of U.S. Steel and the general contractors at Sun, two separate sets of bids were arranged for those projects. While it may be true that these similarities simply indicate a typical bid rigging scheme and would not in and of themselves be sufficient to establish a single conspiracy, they tend to reenforce other evidence that leads to the inference of a single conspiracy.

There are several differences in the way arrangements were handled in each area. Mr. Pinney played a prominent role in arranging the meetings in some areas and was not even a participant in others. The bids in each case were submitted to different offices, the work was done in different places and

sometimes two bids were required instead of one. The government argues that these differences indicate separate conspiracies. These differences do not negate the existence of a single conspiracy but simply reflect a variation in the location of the victims and the manner in which the victims conduct business. The differences are simply adaptations of the same scheme to the individual requirements of each victim.

The government also makes much of the fact that meetings were held in different locations. These meeting places were convenient to the conspirators who attended. Since only Pittsburgh contractors bid at the Western Pa. works, it was convenient to meet downtown. Since both Pittsburgh and Philadelphia contractors were involved in bidding at the Fairless works, a motel near the airport was chosen so that contractors could simply fly in for the meeting. The difference in meeting places does not indicate separate conspiracies, it simply demonstrates the adaptability of the scheme to the circumstances.

The evidence convinces me that there was one general understanding among all the participating electrical contractors which had been in existence for a number of years that bids would be rigged when circumstances permitted regardless of whether the job was at U.S. Steel in Western Pennsylvania, Fairless Hills, Gulf Oil, Arco, Sun Oil or Lukens Steel. Bid rigging at each of these facilities did not reflect separate conspiracies but simply separate manifestations of the same unlawful agreement to rig bids wherever and whenever possible.

Accordingly, the motions to dismiss will be granted.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL ACTION

Nos. 84-00313-01, 84-00313-02, 84-00313-03, 84-00313-04

UNITED STATES OF AMERICA

—v.—

SARGENT ELECTRIC COMPANY, LORD ELECTRIC COMPANY, W.V. PANGBORNE & CO., INC., J.A. BRUCE PINNEY

ORDER

AND NOW, this 26th day of MARCH, 1985, upon consideration of the motions to dismiss filed by the defendants, it is

ORDERED

that the motions are GRANTED and the indictment is hereby DISMISSED as to all defendants.

BY THE COURT

JOSEPH L. MCGLYNN, JR. *J.*

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 85-1262, 85-1263, 85-1264, and 85-1265

UNITED STATES OF AMERICA,

Appellant,

—v.—

SARGENT ELECTRIC CO., LORD ELECTRIC CO., INC., W. V. PANGBORNE AND CO., INC., J.A. BRUCE PINNEY.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Crim. No. 84-00313-01/02/03/04)

Present: ADAMS, GIBBONS, and STAPLETON, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel December 2, 1985.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered March 27, 1985, be, and the same is hereby reversed with direction that trial on the July 19, 1984 indictment may go forward.

ATTEST:
/s/ SALLY MRVOS
Clerk

March 14, 1986

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 85-1262/63/64/65

UNITED STATES OF AMERICA

—v.—

SARGENT ELECTRIC CO., LORD ELECTRIC CO., W. V. PANGBORNE AND CO., INC., J.A. BRUCE PINNEY,

Appellees.

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, and STAPLETON, *Circuit Judges.**

The petition for rehearing filed by appellee, Sargent Electric Co., in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Adams votes for rehearing for the reasons expressed in his dissenting opinion and because the three-way division in the panel fails to provide the necessary clarity and guidance for the courts in this Circuit in an important area of the law.

---

* Judge Mansmann did not participate in this decision.

Judges Hunter, Weis, Garth and Becker would grant the petition for rehearing.

By the Court,

/s/ JOHN J. GIBBONS
Judge

Dated: April 18, 1986

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 85-1262/63/64/65

UNITED STATES OF AMERICA

—v.—

SARGENT ELECTRIC CO., LORD ELECTRIC CO., W. V. PANGBORNE AND CO., INC., J.A. BRUCE PINNEY,

Appellees.

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, and STAPLETON, *Circuit Judges.**

The petition for rehearing filed by appellee, Lord Electric Co., in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Adams votes for rehearing for the reasons expressed in his dissenting opinion and because the three-way division in the panel fails to provide the necessary clarity and guidance for the courts in this Circuit in an important area of the law.

---

* Judge Mansmann did not participate in this decision.

Judges Hunter, Weis, Garth and Becker would grant the petition for rehearing.

By the Court,

/s/ JOHN J. GIBBONS
Judge

Dated: April 18, 1986

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 85-1262/63/64/65

UNITED STATES OF AMERICA

—v.—

SARGENT ELECTRIC CO., LORD ELECTRIC CO., W. V. PANGBORNE AND CO., INC., J.A. BRUCE PINNEY,

Appellees.

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, and STAPLETON, *Circuit Judges.**

The petition for rehearing filed by appellee, W. V. Pangborne & Co., Inc., in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Adams votes for rehearing for the reasons expressed in his dissenting opinion and because the three-way division in the panel fails to provide the necessary clarity and guidance for the courts in this Circuit in an important area of the law.

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* Judge Mansmann did not participate in this decision.

Ju[d]ges Hunter, Weis, Garth and Becker would grant the petition for rehearing.

By the Court,

/s/ JOHN J. GIBBONS
Judge

Dated: April 18, 1986

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 85-1262/63/64/65

UNITED STATES OF AMERICA

—v.—

SARGENT ELECTRIC CO., LORD ELECTRIC CO., W. V. PANGBORNE AND CO., INC., J.A. BRUCE PINNEY,

Appellees.

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, and STAPLETON, *Circuit Judges.**

The petition for rehearing filed by appellee, J. A. Bruce Pinney, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Adams votes for rehearing for the reasons expressed in his dissenting opinion and because the three-way division in the panel fails to provide the necessary clarity and guidance for the courts in this Circuit in an important area of the law.

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* Judge Mansmann did not participate in this decision.

Judges Hunter, Weis, Garth and Becker would grant the petition for rehearing.

By the Court,

/s/ JOHN J. GIBBONS
Judge

Dated: April 18, 1986

Nos. 85-1936, 85-1942, and 85-1950

In the Supreme Court of the United States

OCTOBER TERM, 1985

Supreme Court, U.S.
FILED
JUN 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

LORD ELECTRIC COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

W.V. PANGBORNE AND CO., INC., AND
J.A. BRUCE PINNEY, PETITIONERS

v.

UNITED STATES OF AMERICA

SARGENT ELECTRIC COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in holding that, on the facts as found by the district court, the conspiracy charged in the indictment was not part of a larger conspiracy for which petitioners had been previously placed in jeopardy.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1936

LORD ELECTRIC COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

No. 85-1942

W.V. PANGBORNE AND CO., INC., AND
J.A. BRUCE PINNEY, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 85-1950

SARGENT ELECTRIC COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (85-1942 Pet. App. 1a-35a) is reported at 785 F.2d 1123. The opin-

ion of the district court (85-1942 Pet. App. 36a-55a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1986. Petitions for rehearing were denied on April 18, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On July 19, 1984, a grand jury in the Eastern District of Pennsylvania indicted petitioners Sargent Electric Company (Sargent), Lord Electric Company, Inc. (Lord), W.V. Pangborne and Co., Inc. (Pangborne), and J.A. Bruce Pinney, Pangborne's Executive Vice-President, for violating Section 1 of the Sherman Act, 15 U.S.C. 1. The district court dismissed the indictment, holding that the conspiracy charged was part of a larger conspiracy for which petitioners had previously been convicted and that the indictment was thus barred by the Double Jeopardy Clause. The court of appeals reversed. 85-1942 Pet. App. 2a-3a.

1. The indictment charged the petitioners with conspiring to rig bids on electrical construction projects at United States Steel Corporation's Fairless Hills plant in Bucks County, Pennsylvania (Fairless). Petitioners Sargent and Lord claimed that the conspiracy was part of a larger conspiracy that included rigging bids at United States Steel facilities in Western Pennsylvania (Western Pennsylvania Works) for which they previously had been convicted. Petitioners Pangborne and Pinney claimed that the Fairless conspiracy was part of a larger conspiracy that included bid rigging at Gulf Oil Company in

Philadelphia (Gulf) to which they had pleaded nolo contendere. 85-1942 Pet. App. 3a-4a.

The district court held that there had been a single conspiracy to rig bids, which encompassed bid rigging not only at Gulf, Fairless, and the Western Pennsylvania Works, but also at Lukens Steel in Coatesville, Pennsylvania, the Atlantic Richfield Refinery in Philadelphia, and the Sun Oil Company in Marcus Hook, Pennsylvania. The court acknowledged that the bid-rigging activities at these separate locations involved significantly different companies and individuals (85-1942 Pet. App. 41a-43a);[1] that the activities at the separate locations began and ended at different times and for different reasons (*id.* at 39a, 43a); that for each location there were separate bid-rigging meetings (*id.* at 39a-40a, 54a); and that for each location there was a separate system for allocating work (*id.* at 40a). Thus, although the conspirators tried to allocate the work evenly among themselves at each location, jobs were never traded off between Fairless and any other facility, even when the same companies bid at more than one location (*ibid.*). The district court also acknowledged that some of the companies it considered major participants in a broad conspiracy were actually bidding competitively at some of the locations encompassed in the supposed broad conspiracy (*id.* at 43a-44a, 53a).

Despite these facts, the district court found the existence of a single conspiracy to rig bids "wherever and whenever possible" (85-1942 Pet. App. 55a). The court relied on the participation of some of the

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[1] At each of these locations the company soliciting bids for electrical construction work had a list of invited bidders, and a company could not bid unless it was on the bid list for that project (85-1942 Pet. App. 37a-38a).

conspirators in several schemes[2] and the common objective of all schemes, *i.e.*, to rig bids (*id.* at 49a-50a, 52a).

2. On appeal, none of the petitioners attempted to defend the district court's conclusion that there was a single conspiracy that linked Western Pennsylvania, Gulf, and Fairless. Each petitioner tried to tie the Fairless conspiracy to the particular conspiracy for which it had previously been prosecuted—*either* Western Pennsylvania *or* Gulf—but none seriously argued that there was a conspiracy that linked Western Pennsylvania *and* Gulf.[3]

---

[2] No company or individual participated at every location (see 85-1942 Pet. App. 41a-43a). Although the district court's chart (*id.* at 42a, 43a) shows one company, Foley, as a "participant" at all locations, that is apparently a typographical error, for the district court found that Foley did not rig bids at Lukens Steel (*id.* at 44a, 51a-52a).

[3] See court of appeals briefs: Lord Br. 4 n.5; Sargent Br. 10-11; Pangborne Br. 6 n.5.; Pinney Br. 4 n.4; see also 85-1942 Pet. 10-11 (continuing to argue for a "Philadelphia area" conspiracy); 85-1950 Pet. 3 (emphasis added) (claiming district court found "one conspiracy to rig bids for all electrical construction projects *at United States Steel Corporation*, regardless of the location of the project"). Indeed, the record forcefully negates any link between Gulf and Western Pennsylvania. Not a single individual was common to both schemes. And, although the Howard P. Foley Company participated in both conspiracies, Foley's representative in the Gulf bid rigging, Herbert Geuther, was not even aware that bid rigging was occurring at the Western Pennsylvania Works. C.A. App. 627. Even Paul Arbogast, the officer who led Lord's bid rigging, testified in the district court that, in his view, the bid-rigging conspiracy encompassed only U.S. Steel Corporation jobs (*i.e.*, Fairless and the Western Pennsylvania Works); he did not place any other "Philadelphia area" sites in this conspiracy. 85-1942 Pet. App. 19a n.8.

The court of appeals reversed by a 2-1 vote, with each judge writing separately. Judge Gibbons "accept[ed] as true the underlying facts" as found by the district court (85-1942 Pet. App. 14a). He determined, however, that the district court's conclusion that there was a single conspiracy was either a finding of fact that was inconsistent with the historical and narrative facts and thus clearly erroneous, or an erroneous conclusion of law (*id.* at 14a-16a & n.3). Judge Gibbons also analyzed the relevant market in light of the district court's factual findings and concluded that the participants in the broad conspiracy defined by the district court were not competitors or potential competitors of each other at many of the locations encompassed in that conspiracy. In these circumstances, Judge Gibbons believed that the existence of a single overarching conspiracy could not be inferred from the circumstantial evidence in this case (*id.* at 7a-8a, 15a).

Judge Stapleton also accepted the underlying findings of the district court and concluded that the evidence compelled the conclusion that defendants had engaged in site-by-site bid rigging rather than a single overarching conspiracy (85-1942 Pet. App. 17a-19a, 20a-21a).[4]

Judge Adams dissented, concluding that, although "the record might support an inference that multiple conspiracies existed" (85-1942 Pet. App. 34a), the district court's finding of a single conspiracy was not clearly erroneous.

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[4] Judge Gibbons specifically joined in Judge Stapleton's analysis of "the absence of evidence which could justify a finding of a single overreaching [*sic*] conspiracy." 85-1942 Pet. App. 14a n.3.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

Although petitioners attempt to convert statements by individual judges of the court of appeals into legal holdings with far-reaching implications, the only question truly presented by this case—and the question treated as decisive by each of the three judges—is whether, under all the circumstances, the Fairless conspiracy was part of an overarching conspiracy for which petitioners had previously been placed in jeopardy. The answer to that question depends, of course, on the unique facts of this case. See *Blumenthal* v. *United States*, 332 U.S. 539, 553-559 (1947). The majority of the court of appeals, accepting findings of underlying fact made by the district court, correctly determined that the district court's inference of a single overarching conspiracy was clearly erroneous.

1. Both Judge Gibbons and Judge Stapleton recited in detail the facts, either undisputed or specifically found by the district court, that compelled the conclusion that there were separate conspiracies. As Judge Gibbons observed (85-1942 Pet. App. 15a):

> The district court found that at each facility there were separate bid lists; that the purchasers, not the bid-riggers, controlled access to those bid lists; that the membership of different lists was not identical; that some firms qualified to bid at more than one facility did not rig bids at all of them; that separate bid-rigging meetings were held with respect to each facility; that the allocation of business among the bid-riggers was made on a facility-by-facility basis; that not all the conspiring personnel knew each other; that

> the bid-rigging commenced at each facility at different times; and that bid-rigging ended at each facility at different times and for different reasons.

Judge Stapleton noted (85-1942 Pet. App. 17a-19a (footnotes omitted)):

> The trial court found or the undisputed evidence demonstrated (1) that there was a different group of bidders at each site; (2) that separate bid rigging meetings were held, and separate records maintained, for each site; (3) that precautions taken against discovery varied; (4) that the allocation of business at Western [Pennsylvania] Works, Fairless, Gulf and virtually all other sites was made exclusively on a site-by-site basis despite the feasibility of trade-offs between sites as demonstrated by those which occurred between Western [Pennsylvania] Works and Jones & Laughlin Steel; (5) that the method for designating the low bidder varied; (6) that some firms qualified to bid at more than one site did not rig bids at all of them; (7) that not all of the conspiring personnel knew one another; (8) that several of the purported "core" conspirators did not know that bid rigging was going on elsewhere than at their particular location; (9) that the bid rigging commenced at each site at a different time; and (10) that the bid rigging ended at each facility at different times and for different reasons.[5]

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[5] Immediately after setting forth these extensive, undisputed facts, each judge noted that the recited facts compelled a conclusion that there were multiple conspiracies in the absence of "others pointing the other way" (85-1492 Pet. App. 15a) or "unambiguous evidence suggesting an overarching conspiracy" (*id.* at 19a). Taking this latter phrase out of context, Lord and Pangborne assert that the court of appeals im-

Petitioners cite other cases involving some of these factors, but they point to no case in which a finding of a single conspiracy has been allowed to stand in the face of all (or nearly all) of these factors demonstrating the existence of multiple conspiracies (see 85-1936 Pet. 11-12; 85-1942 Pet. 13-15; 85-1950 Pet. 11-12). In *United States* v. *Beachner Construction Co.*, 729 F.2d 1278 (10th Cir. 1984), the "single conspiracy" found was one in which, for 25 years, the conspirators rigged bids submitted to a single customer, the Kansas Department of Transportation. Obviously, that case did not involve facts, like those recited above, indicating the existence of overlapping but distinct conspiracies involving different customers and facilities. The argument that the court rejected in *Beachner* was that there was a separate conspiracy each time the Kansas Department of Transportation let new bids (729 F.2d at 1283). That argument was not made in this case and is not the basis of the decision of the court of appeals (see pp. 18-19, *infra*).

In *United States* v. *David E. Thompson, Inc.*, 621 F.2d 1147 (1st Cir. 1980), there is no indication in the court's opinion that the bid riggers' work allocations were separate for each customer or that par-

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properly placed the burden of proof on defendants (85-1936 Pet. 14-15; 85-1942 Pet. 9 n.2). The assertion is wholly without merit. The recited facts showed that the government had amply met its burden of proof, and Judge Stapleton remarked only on what it would have taken, in the face of the government's evidence, to support the district court's contrary conclusion. Moreover, by placing the burden of proof on the government (see 85-1942 Pet. App. 4a (citing *United States* v. *Inmon*, 568 F.2d 326, 331-332 (3d Cir. 1977))), the Third Circuit was actually more generous to petitioners than some other circuits (see 85-1936 Pet. 15).

ticipants in the conspiracy were simultaneously rigging bids for one customer's jobs and bidding competitively for other customers' jobs, as in this case. Indeed, the argument that separate customers or facilities were the objects of separate conspiracies was not even made; the argument the court rejected was that the original conspiracy died in 1970 and a new one began in 1972 with the same core participants but some shifts in membership. 621 F.2d at 1151-1152. As in *Beachner*, the court also rejected "appellant's claim that each incident of bid rigging was approached on an isolated, *ad hoc* basis" (*id.* at 1152).

Finally, in *United States* v. *Consolidated Packaging Corp.*, 575 F.2d 117 (7th Cir. 1978), the existence of a nationwide conspiracy was conceded, and Consolidated's argument was that it was not part of that conspiracy. The case stands for the proposition that one may join a conspiracy without knowing all its members or participating in every price-fixing incident; the case says nothing about what facts indicate a single conspiracy and what facts indicate multiple conspiracies.[6]

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[6] Lord alone (85-1936 Pet. 11, 12) relies on *United States* v. *Portsmouth Paving Corp.*, 694 F.2d 312 (4th Cir. 1982). In that case, the defendant claimed that "economic feasibility would not allow [it] to bid on contracts originating in Virginia Beach," but the evidence showed that it *had* "agreed to the allocation of contracts and the rigging of bids with companies based in Norfolk and Virginia Beach" (694 F.2d at 319). Moreover, illegal territorial allocation was part of the conspiracy alleged and proved in that case (*ibid.*), and a conspiracy to allocate territories obviously must be treated as one conspiracy, not a separate conspiracy in each territory. And again, the case did not involve critical factors present in this case, such as the absence of tradeoffs between

In sum, the decision below turns on the unique facts of this case and does not conflict with any decision of another court of appeals. Judges Gibbons and Stapleton reached the ultimate issue by somewhat different paths, but both concluded that the undisputed facts, and the facts found by the district court, required a determination that there were multiple conspiracies. That determination does not warrant review by this Court.

2. a. Petitioners claim that the Court should grant certiorari to review a conflict in the circuits as to the application of the "totality of the circumstances" and "same evidence" tests (85-1936 Pet. 12-14; 85-1950 Pet. 9-11). However, even though the Third Circuit has not expressly adopted the "totality of the circumstances test" used in other circuits, Judges Gibbons and Stapleton each examined the totality of the facts in detail; neither relied on the mere fact that the allegations of the indictment could not be proved using the "same evidence" as would prove the allegations of the previous indictments (see, *e.g.*, 85-1942 Pet. App. 10a-14a, 17a-20a).

Indeed, Judge Adams recognized in his dissent (85-1942 Pet. App. 31a) that in practice the Third Circuit has followed the other circuits in employing the totality-of-the-circumstances approach, although it has not expressly adopted it. Thus there is no conflict in the circuits for the Court to resolve.[7]

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different locations and the simultaneous participation of some conspirators in schemes at one place and nonparticipation by the same parties in schemes at other places.

[7] Sargent appears to acknowledge that the courts of appeals are in agreement in following the totality-of-the-circumstances approach and that the approach is correct. Sargent nonethe-

b. Petitioners claim (85-1936 Pet. 15-16; 85-1942 Pet. 10-11) that the decision of the court of appeals conflicts with *Anderson* v. *City of Bessemer City*, No. 83-1623 (Mar. 19, 1985). Unlike the lower court in *Bessemer City*, however, the court here did not undertake a de novo review of the record, reweigh the credibility of witnesses, or displace the district court's findings with its own assessment of the facts. *Bessemer City*, slip op. 11, 12.[8] Indeed, Judges Gibbons and Stapleton expressly accepted the district court's findings of historical and narrative fact (85-1942 Pet. App. 15a, 19a). As Judge Gibbons put it, those "historical or narrative facts found by the district court require a holding that the United States established, as a matter of law, that the bid-rigging at the different facilities constituted multiple Sherman Act offenses" (*id.* at 15a).

All that the majority of the court of appeals rejected were the district court's speculative "explanations" and conclusions, which the historical and narrative facts either failed to support or flatly contradicted. For example, Judge Gibbons noted (85-1942 Pet. App. 13a) that, "[w]hile observing that '[t]he parties' relationships at one facility depended upon their relationship at the others,' the district court discounted the undisputed fact that The Foley Co. did

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less asks this Court to grant certiorari because *it* has never adopted this standard (85-1950 Pet. 10-11). Since Sargent does not point to a misapplication of this Court's standards or any claimed conflict in the standards adopted by the circuits, Sargent's plea for the Court to set a standard should be rejected.

[8] Judge Gibbons explicitly recognized that the court was not free to "select among competing permissible inferences" from the factual record (85-1942 Pet. App. 6a).

not rig bids at Western Works or at Lukens Steel while it participated in bid-rigging at [Gulf and Fairless]."[9] Similarly, the majority credited the district court's factual conclusion that the separate schemes began and ended at different times and for different reasons. What the majority did not accept was the district court's "explanation" that the inference of separate conspiracies was negated because the schemes ended for reasons that were beyond the conspirators' control. As Judge Gibbons noted, the very absence of control (and the fact that each scheme was able to succeed independent of any other) is "strong evidence of the absence of interdependence among the separate markets and thus undercuts the [district] court's ultimate conclusion that the participants acted pursuant to a single overarching conspiracy" (85-1942 Pet. App. 14a). The majority also concluded that the district court had unduly emphasized that each scheme had the "common objective" (*id.* at 52a) of price fixing,[10] while discounting most of its other findings that negated the exist-

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[9] See also 85-1942 Pet. 11 & n.4 (relying on the same faulty premise as the district court). Pangborne also claims that a single conspiracy should be inferred because four contractors "did most of the bidding" at Arco, Gulf, Sun, Lukens, and Fairless (but not the Western Pennsylvania Works) (*id.* at 10). But one of those four contractors was Foley, which was bidding competitively at Lukens at the same time it was rigging bids at other facilities. Thus, the behavior of those four contractors was more consistent with the hypothesis of separate, facility-by-facility conspiracies than with the hypothesis of interdependent schemes at the different facilities.

[10] If a "price fixing" objective were sufficient to link conspiracies involving different participants, times, locations, and activities, then most Sherman Act indictments in the country would be part of a single conspiracy.

ence of a common scheme, *e.g.*, the differences in meeting places, the differences in the manner in which bids were submitted, the differences in time periods, and the fact that some so-called "core conspirators" (85-1942 Pet. App. 50a) were *not* rigging bids everywhere they could (*id.* at 13a, 17a-19a).[11]

This Court observed in *Bessemer City* that " 'a [factual] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court *on the entire evidence* is left with the definite and firm conviction that a mistake has been made.' " Slip op. 8 (emphasis added) (quoting *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). The majority followed that principle in concluding that, in light of the entire record, the facts found by the district court could not as a matter of law establish a single conspiracy (85-1942 Pet. App. 15a, 20a-21a). That conclusion does not warrant further review.

3. a. Petitioners contend that Judge Gibbons' statements about "relevant markets" (85-1942 Pet. App. 7a-8a) conflict with prior decisions of this Court and other courts of appeals that hold that proof of the relevant market is not an essential element of a per se Sherman Act violation (85-1936 Pet. 9-12; 85-1942 Pet. 7-9; 85-1950 Pet.

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[11] Both Lord and the Foley Company were bidding competitively at Lukens (85-1942 Pet. App. 13a, 33a, 42a, 51a-52a). Foley also discontinued its participation in the Western Pennsylvania Works conspiracy while continuing to rig bids at Fairless and other places (*id.* at 43a, 53a). And another so-called "core conspirator," the Ortlip Company, did not rig bids at the Western Pennsylvania Works because Ortlip was "distrust[ed]" by the Western Pennsylvania Works conspirators (*id.* at 50a).

6-9).[12] But dicta in the opinion of a single judge do not merit this Court's review. "This Court * * * reviews judgments, not statements in opinions" (*Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956)). And, although Judge Gibbons used the phrase "relevant markets" imprecisely, his remarks about "relevant markets" do not undermine his conclusion that the evidence as a whole showed multiple conspiracies.

Judge Gibbons concluded that one of the circumstances relevant to determining whether there was one conspiracy or several was whether the conspirators focused on one large "market" or several distinct "markets." This was not error.[13] To the contrary,

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[12] Sargent states that "it is undisputed that persons accused of conspiracy under Section 1 of the Sherman Act must be actual or potential competitors" and that "the terms 'relevant market' and 'competitors' may at first blush seem to be identical,' " but Sargent quarrels with the "narrow" way in which Judge Gibbons "defined" relevant market (85-1950 Pet. 7). Sargent then offers a "hypothetical" to show why Judge Gibbons' market definition could be incorrect in some cases (*id.* at 8). But that hypothetical is not this case; and, as noted at pp. 6-7, *supra*, Judge Gibbons relied on considerably more than the proposition that a contractor not on a bid list is not a "potential competitor."

[13] Judge Gibbons did not, as petitioners imply, state that proof of a relevant market is essential in all Section 1 cases; no such question was presented in this case. Judge Gibbons expressly acknowledged that proof of a relevant market is not essential to prove a violation when evidence of a horizontal agreement exists: that evidence, of itself, "tends to define the relevant market, for it tends to show that the parties to it are at least potential competitors. If they were not, there would be no point to such an agreement. Thus its very existence supports an inference that it would have an effect in a relevant market." 85-1942 Pet. App. 7a-8a; accord,

applying the "totality of the circumstances" approach to determine whether the district court properly inferred the existence of a single large conspiracy from the circumstantial evidence in this record, Judge Gibbons correctly stated that companies that are not actual or potential competitors have little incentive to agree to rig bids because "there would be no point to such an agreement." 85-1942 Pet. App. 7a.[14] A pattern of bid rigging is less likely to be part of a single conspiracy when, as in this case, the participants in the alleged single conspiracy are not actual or potential competitors with respect to many of the contracts that are rigged.[15]

Neumann v. *Reinforced Earth Co.*, 786 F.2d 424, 428 (D.C. Cir. 1986) (Bork, J.); see also *FTC* v. *Indiana Federation of Dentists*, No. 84-1809 (June 2, 1986), slip op. 12 (quoting *NCAA* v. *Board of Regents*, 468 U.S. 85, 109-110 (1984) ("absence of proof of market power does not justify a naked restriction on price or output")). The issue in this case, however, is not whether there was an agreement but instead what the scope of the agreement or agreements was (see 85-1942 Pet. App. 8a).

[14] As Judge Adams acknowledged in his dissent (85-1942 Pet. App. 25a), "it seems unlikely that a situation would actually arise in which two conspirators that are truly not in competition would agree to engage in an anticompetitive practice when that agreement could in no way benefit either conspirator."

[15] Pangborne argues (85-1942 Pet. 11) that "the Court of Appeals" (*i.e.*, Judge Gibbons) erred in concluding that the participants in the district court's conspiracy are not potential competitors, claiming that "all the defendants competed for jobs in the Philadelphia area." But the district court found that there was a conspiracy encompassing more than the "Philadelphia area" (see note 3, *supra*). According to the district court, the conspiracy encompassed bid rigging in Western Pennsylvania and "wherever * * * possible" (85-1942

Other courts have similarly relied on market factors to determine the scope of a Sherman Act conspiracy. In *United States* v. *Korfant*, 771 F.2d 660 (2d Cir. 1985), the defendants had claimed that their conspiracy to fix poultry prices in New England was part of a conspiracy to fix poultry prices in Ohio. The court noted that, even "[a]ssuming that First National did establish and attempt to execute an overall plan to fix prices in each of its regional markets, success in each depended upon its ability to achieve agreements with two distinct sets of competitors and upon the response of two distinct consumer markets to the implementation of such agreements. Such functional independence reflects two conspiracies, not one." 771 F.2d at 663. *Korfant* thus lends strong support to the decision of the court of appeals

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Pet. App. 55a). Moreover, even in the localities encompassed in the "Philadelphia area," neither the defendants, nor most of the other participants in the broad conspiracy perceived by the district court, actually or potentially competed. The only place in which all four defendants actually competed was Fairless, the site that is the subject of this indictment. Nor were all the various contractors from Western Pennsylvania to Philadelphia to Coatesville even "potential" competitors of each other. As the district court acknowledged (85-1942 Pet. App. 37a), at least some of the victims of the various bid-rigging schemes wanted contractors in their immediate local area to perform their work, and U.S. Steel particularly wanted contractors with steel mill experience (see also C.A. App. 325, 335). Thus, even though some companies were potential competitors at some sites because they met the customer's qualifications and might be added to a bid list on a future project (cf. 85-1942 Pet. 11), most companies included in the broad conspiracy perceived by the district court (*e.g.*, Henckels & McCoy at Lukens, Progressive at Sun Oil, Riggs-Distler at Arco, or Meade, Tico, and Fuellgraf in Western Pennsylvania) could never have qualified at most of the sites included in that conspiracy.

in this case. Cf. 85-1950 Pet. 11-12. In *United States* v. *Ashland-Warren, Inc.*, 537 F. Supp. 433 (M.D. Tenn. 1982), the court rejected defendants' claim that bid-rigging conspiracies on road-paving contracts in Tennessee and Virginia were related, reasoning in part that the contractors in Tennessee and Virginia were, for the most part, not even potential competitors of each other. 537 F. Supp. at 446. The court's analysis was similar to that employed by Judge Gibbons in this case.

Whatever its defects might be in other contexts, Judge Gibbons' approach of defining a "relevant market" is pertinent in determining the scope—as opposed to the existence—of a price-fixing conspiracy. In addition, Judge Gibbons relied on a number of factors, not tied to his "market" analysis, in determining that there were multiple conspiracies rather than one (see pp. 6-7, *supra*). Therefore, Judge Gibbons' analysis of the district court's factual findings does not present an issue warranting review by this Court.

b. Just as petitioners challenge certain statements in Judge Gibbons' opinion that were not joined by Judge Stapleton and are inessential to the court's holding, so too Lord criticizes a portion of Judge Stapleton's concurrence as "replac[ing] traditional analysis of Sherman Act conspiracies with speculative, *a priori* economic theorizing" (85-1936 Pet. 10). Judge Stapleton's observations do not warrant review. Judge Stapleton considered whether the conspirators were likely to engage in site-by-site or broad-ranging bid-rigging agreements (see 85-1942 Pet. App. 16a-17a). Judge Stapleton reviewed the evidence as a whole and concluded, first, that the record was barren of evidence as to why the conspirators would have engaged in a single broad-ranging con-

spiracy. Judge Stapleton was surely entitled to rely on "common sense and economic theory" in assessing the evidence (see *FTC* v. *Indiana Federation of Dentists*, No. 84-1809 (June 2, 1986), slip op. 8-9), and there is nothing wrong with demanding evidence of motive before accepting a factual finding that economic actors behaved in a way contrary to common sense and economic theory. Viewing the evidence in its entirety, Judge Stapleton also concluded that "all of the circumstantial evidence either strongly favors or is consistent with a finding of multiple conspiracies." 85-1942 Pet. App. 17a.

c. Lord interprets Judge Gibbons' opinion to "hold[] that * * * the bid lists on each project defined the relevant market and therefore the conspiracy" (85-1936 Pet. 10; see also 85-1942 Pet. 10-11). This "holding," petitioners claim, conflicts with other decisions that have found a single conspiracy notwithstanding the existence of different bidders on different projects (85-1936 Pet. 11-12; 85-1942 Pet. 13-15). Judge Gibbons, however, did not define the conspiracies in the way petitioners claim. What Judge Gibbons stressed in his "market" analysis was that most contractors were not "qualified" and could not get on the bidders' lists at all locations (85-1942 Pet. App. 12a) and thus were not even "potential" competitors of the others bidding at those sites.

The clearly established law in the Third Circuit is that a single conspiracy may encompass bid riggers who do not all appear on a single bidders' list. *United States* v. *Fischbach & Moore, Inc.*, 750 F.2d 1183 (1984) (single conspiracy existed to rig bids at the Western Pennsylvania Works, despite changes in the bidders' lists from project to project), cert. denied, No. 84-1203 (Mar. 4, 1985) and No. 84-1331 (Mar.

25, 1985). Judge Gibbons took special note of *Fischbach & Moore* but expressed no disagreement with that decision (85-1942 Pet. App. 8a-9a).[16]

The decision of the court of appeals represents a holding, based on the totality of the circumstances and the entire record, that there were separate conspiracies at the Western Pennsylvania Works, at Gulf, and at Fairless. It does not overturn the prior holding of the court of appeals in *Fischbach & Moore* that a single conspiracy may involve several distinct bidders' lists. The "holding" that petitioners ask this Court to review simply does not exist.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1986

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[16] Judge Adams, in dissent, did not suggest that Judge Gibbons' approach was inconsistent with *Fischbach & Moore*, and Chief Judge Aldisert, the author of *Fischbach & Moore*, apparently did not perceive the decision in this case as inconsistent with *Fischbach & Moore*, for he voted to deny rehearing en banc (85-1942 Pet. App. 58a-65a).

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No. 85-1942

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

W.V. PANGBORNE AND CO., INC.,
and J.A. BRUCE PINNEY,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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August 29, 1986

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ARGUMENT

The government opposes the petition by repeatedly asserting that the court of appeals' ruling "depends * * * on the unique facts of this case" (Br. in Opp. 6) and does not decide any important legal issue. That assertion both misrepresents what the court decided and what the government itself argued below. The court of appeals rejected the district court's fact finding of a single, overarching conspiracy only because it

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* Pursuant to Rule 28.1 of this Court, Petitioner W.V. Pangborne and Co., Inc. ("Pangborne") hereby refers to the listing of Pangborne's parents and their subsidiaries included in Pangborne and J. A. Bruce Pinney's Petition for a Writ of Certiorari, dated May 23, 1986.

created erroneous legal standards that undermined the district court's factual conclusions.

1. Contrary to the government's contention, the court of appeals' rejection of petitioners' double jeopardy defense did not depend upon a fact-bound assessment of "whether, under all the circumstances, the Fairless conspiracy was part of an overarching conspiracy for which petitioners had previously been placed in jeopardy" (Br. in Opp. 6). If it did, the decision below would warrant summary reversal under *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985). The district court made careful fact-findings explaining why each of the facts mentioned by the government was consistent with the existence of only a single conspiracy. See Pet. App. 49a-55a. These fact-findings cannot be characterized as clearly erroneous.[1]

Despite the government's efforts to obscure the point, the decision below plainly was the product of disagreement with the district court on important issues of antitrust law. Judge Gibbons "accept[ed] as true the underlying facts" (Pet. App. 14a) and expressly stated that the district court's fact findings "*would be plausible* except for the absence of any evidence tending to show that the conspirators had any control over the dimensions of the market defined by the purchasers' independent decisions to deal only with prequalified bidders" (*id.* at 13a-14a; emphasis added). Thus, the sole basis for Judge Gibbons' ruling was his legal theory that there had to be a

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1 The government asserts (Br. in Opp. 4) that petitioners Pangborne and Pinney did not support the district court's decision in the court of appeals. This is incorrect. In the footnote to the Third Circuit brief cited by the government, petitioners made clear that they were only discussing that portion of the facts found by the district court relating to themselves, but that this discussion in no way represented any disagreement with any of the court's other findings. Indeed, the district court's findings with respect to the Philadelphia aspects and the United States Steel aspects were consistent and congruent. See Pet. 10 n.3.

"relevant market" in a bid-rigging case and that that market was limited to sellers on restricted bidders' lists.[2]

By the same token, Judge Stapleton accepted the underlying fact findings of the district court. Judge Stapleton rejected the court's finding of a single conspiracy only because, relying on what "[e]xperience teaches" as to a bid-rigger's desire to "maximize his risk/benefit ratio" (Pet. App. 16a), he concluded that petitioners had no motive for preferring a single, large conspiracy to multiple, smaller ones. Judge Stapleton thus created a legal presumption in favor of multiple conspiracies that not only lacks any support in precedent or "experience," but also is totally inconsistent with the position taken by the government in previous price-fixing cases.

Not surprisingly, the government only half-heartedly defends these legal rulings, asserting that some parts of Judge Gibbons' formulation were "imprecise[ ]" (Br. in Opp. 14) and may have "defects * * * in other contexts" (*id.* at 17), that other parts were "dicta" (*id.* at 14), and that there was "nothing wrong" (*id.* at 18) with Judge Stapleton's unique approach. In fact, as we demonstrated in the petition, these rulings were plainly incorrect, both as a matter of antitrust law and as a matter of economics, and conflict with the decisions of other circuits.

2. Judge Gibbons' entire analysis was predicated on the faulty assumption that a customer's selection of a seller determines the boundaries of competition and, therefore, the relevant market for antitrust purposes. But it is the *opportunity* of customers to utilize the services of particular sellers, whether they choose to do so or not, and the *opportunity* of sellers to satisfy the customers' demands, that define the market and determine the actual or potential competitors within that

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2 Apparently recognizing the flaws in Judge Gibbons' market analysis, the government first labels it as "dicta" (Br. in Opp. 14) and then attempts to recast it falsely as part of an inquiry into the "totality of the circumstances" (*id.* at 14-15). The government's evident discomfort with Judge Gibbons' approach, which was central to his decision to reverse the district court's judgment, is telling.

market. See Sullivan, ANTITRUST 41 (1977). Although Judge Gibbons maintained that each facility had to be a separate market because each facility chose the companies permitted to bid on a particular job, *any* of the conspirators could have replaced the services of any other electrical contractor in any part of the state. Thus, they all were at least potential competitors in the relevant market.

Other circuits have recognized this fundamental point and refused to follow Judge Gibbons' approach.[3] In *United States v. Beachner Construction Co.*, 729 F.2d 1278, 1281 (10th Cir. 1984), for example, the Tenth Circuit held that the relevant inquiry in the determination of multiple conspiracies is "whether the record . . . is sufficient to establish that [all conspirators] had a *single, common, and continuing objective*" (emphasis added). The *Beachner* court did not insist on defining the relevant market, and it certainly did not conclude that the only companies that could be considered potential competitors, and hence co-conspirators, were those companies selected by the Kansas Department of Transportation to submit bids. Rather, the court held that there was a single conspiracy among the companies to which the victim of the conspiracy *could* have turned. Thus, the conspiracy embraced all "asphalt contractors in Kansas," despite the fact that not every asphalt contractor bid on every job or was interested in doing so.

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3 The government attempts to distinguish these cases on the facts, noting that in no other case had the finding of a single conspiracy been allowed to stand "in the face of all (or nearly all) of these factors demonstrating the existence of multiple conspiracies." Br. in Opp. 8. But, as noted in the text, this case was not decided on the facts. Judge Gibbons stated that the district court's finding of potential competition, and hence of one overarching conspiracy, would be "plausible" except for the absence of evidence showing that all of the alleged conspirators were on the approved bidders' lists at each facility or could put themselves on those lists. Thus, Judge Gibbons' faulty definition of "relevant market" was the keystone of his decision. No other court of appeals has maintained the distorted view of market competition that Judge Gibbons insists is an element of a bid-rigging conspiracy.

The government attempts to distinguish *Beachner* on the ground that it involved only a single customer, the Kansas Department of Transportation, rather than several different customers. Br. in Opp. 8. But the decision in this case did not turn on the fact that more than one customer was an alleged target of the bid-rigging conspiracy. (In fact, the Third Circuit expressly found that the conspiracy to rig bids to United States Steel in Pittsburgh was separate from the conspiracy to rig bids to United States Steel in Philadelphia.) The decision below instead was premised on the lack of "potential competition between a party not on an approved list of vendors and a party on such a list" (Pet. App. 13a). Moreover, *Beachner* involved restricted bid lists on which different companies were placed at different times over the 25-year life of the conspiracy. Yet the *Beachner* court concluded that there was only one conspiracy. 729 F.2d at 1283.

Judge Gibbons' opinion also conflicts with *United States v. David E. Thompson, Inc.*, 621 F.2d 1147 (1st Cir. 1980), where the court found a single on-going conspiracy among architectural hardware suppliers in New England. The First Circuit did not hold that potential competition was defined by the customers' selection of bidders, despite the fact that "[i]n some instances, bids have been allowed by invitation only, with as few as three firms receiving invitations." *Id.* at 1149. The "relevant market" in *Thompson* included the market for architectural hardware in New England, *i.e.*, all of the suppliers to which the victims of the conspiracy *could* have turned.[4] The *Thompson* court, like the *Beachner* court, stressed the single, common, and continuing objective of the conspirators, *id.* at

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4 The government incorrectly states (Br. in Opp. 8-9) that "there is no indication [in *Thompson*] that the bid riggers' work allocations were separate for each customer or that the participants in the conspiracy were simultaneously rigging bids for one customer's jobs and bidding competitively for other customers' jobs." In fact, as the First Circuit noted, "[o]n some projects, he [McCabe of Campbell Hardware] expressly sought 'cover bids' from Thompson, Inc., and on others he apparently did not." 621 F.2d at 1150. In addition, although this factor had no bearing on the Third Circuit's decision in this case, there were separate allocations for separate customers in *Thompson*. See *ibid.*

1152, in determining whether one or multiple conspiracies existed.

Finally, Judge Gibbons' reasoning contradicts the analysis of the Seventh Circuit in *United States v. Consolidated Packaging Corp.*, 575 F.2d 117 (7th Cir. 1978).[5] In that case, as here, individual purchasers solicited bids from far fewer than all of the alleged conspirators. Indeed, the five episodes discussed at length in the court's opinion dealt with wholly different bid lists. Yet the government argued, and the Seventh Circuit agreed, that these episodes were part of an overall conspiracy that was "available for use whenever and to the extent it might help fulfill the needs of any subgroup of conspirators." *Id.* at 122. Thus, the Seventh Circuit, unlike the Third Circuit (see Pet. App. 7a), did not find that a conspiracy to rig bids "wherever and whenever possible" was "meaningless" and did not insist, as the court below did, that the market be determined by the customers' choice of sellers. See Pet. App. 13a. The Seventh Circuit considered Consolidated a competitor in the national marketplace because purchasers *could* have turned to it, not because they actually did.

3. The government fares no better in trying to defend Judge Stapleton's approach. Judge Stapleton held that there were multiple conspiracies only because he found no evidence of a "substantial benefit" to the participants in the alleged overarching conspiracy that was not obtainable from site-by-site agreements. For example, while the district court found it significant that bidders at one site could trust one another at

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5 The government claims that *Consolidated* "says nothing about what facts indicate a single conspiracy and what facts indicate multiple conspiracies" (Br. in Opp.). But the significance of the case is apparent: the Seventh Circuit found that Consolidated was not a major producer of cartons and was not interested in many of the bids that were rigged. 575 F.2d at 125, 127. Nonetheless, it still considered Consolidated part of the national market and upheld its conviction for involvement in a nationwide conspiracy that made bid-rigging possible wherever and whenever needed. Contrary to the government's representation (Br. in Opp. 9), the existence of a nationwide conspiracy in *Consolidated Packaging* was *not* conceded, but rather was the first question to be resolved. 575 F.2d at 120.

other sites, Judge Stapleton determined that this benefit was not substantial enough since "such knowledge was as available and as valuable to a firm making site-by-site decisions on whether to rig bids as it would have been to a member of a grander conspiracy. In short, the 'trust factor' provided no motivation for a prospective conspirator to forego the natural preference for site-by-site decision-making." Pet. App. 17a.

Judge Stapleton's use of a novel "substantial benefit" theory is plainly contrary to settled law. There is absolutely no basis for presuming the existence of multiple conspiracies, thereby allowing the government to fragment a case into multiple prosecutions, simply because no specific evidence exists to show that a "substantial benefit" would be gained from a single large conspiracy that was not available from multiple smaller conspiracies. Although the government asserts that Judge Stapleton was entitled to rely on "common sense and economic theory in assessing the evidence" (Br. in Opp. 18), the "substantial benefit" theory reflects neither common sense nor economic theory.

No other circuit has accepted a "substantial benefit" theory as a reason for finding multiple conspiracies. To the contrary, several other courts, *at the government's urging*, have relied on the "trust factor" rejected by Judge Stapleton as the very reason for finding the existence of a single conspiracy. Thus, in *Thompson*, the First Circuit *upheld* the government's claim of a single conspiracy by referring to the fact that the trustworthiness of other conspirators from one job to the next facilitated the bid-rigging and made "reasonable an inference of continuity which suffices to rebut [defendant's] claim that each incident of bid-rigging was approached on an isolated, *ad hoc* basis." 621 F.2d at 1152. And, in *Consolidated Packaging*, the Seventh Circuit gave the same weight to evidence of trust between conspirators: "It does not appear that a competitor needed to approach each new bid-rigging occasion in search of some dishonest accommodation with the great care or caution which might reasonably be anticipated in an isolated instance of soliciting illegal cooperation with a competitor." 575 F.2d at 121. See also *id.* at 122. Finally, the Tenth Circuit in *Beachner*

found it persuasive evidence of a single overarching conspiracy that one coconspirator could easily "plug into" the bid-rigging system among Kansas asphalt contractors. 729 F.2d at 1282-1283.

4. If the need for clarification of the governing double-jeopardy standards in antitrust conspiracies were not already apparent, that need has now been demonstrated by the recent decision in *In re Grand Jury Proceedings*, No. 85-6155, slip op. (6th Cir. July 31, 1986). (A copy of this opinion is provided herewith in the Appendix.) There, the Sixth Circuit upheld the district court's finding that an indictment for bid-rigging was not barred by a prior bid-rigging prosecution on another electrical construction project, but the court's confusing analysis cannot be reconciled with the decision below. First, although the two bids involved were to separate utilities with distinct bid lists, the Sixth Circuit, unlike Judge Gibbons, attached no significance to that fact. Second, the Sixth Circuit recognized that there would be an overlap of coconspirators if one bid had been made by a parent and another by a subsidiary. App. at 7a. Finally, the Sixth Circuit did not attach substantial significance to the lack of a complete overlap. *Ibid.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

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August 29, 1986

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 85-6155

Decided and Filed July 31, 1986

IN RE:

GRAND JURY PROCEEDINGS

ON APPEAL from the United States District Court
for the Eastern District of Kentucky.

Before:

JONES, WELLFORD and NELSON,
Circuit Judges.

JONES, *Circuit Judge.* Defendants appeal the district court's denial of their pretrial motion to dismiss the indictment against them. They assert that this prosecution is barred by the double jeopardy clause because the conspiracy charged in the indictment is allegedly part of a conspiracy for which they have earlier been tried. The court below concluded that separate conspiracies exist. We agree and affirm.

On June 14, 1984, a federal grand jury sitting in Covington, Kentucky, indicted Lord Electric Company (Lord Electric), two of its executives, Peter Matthews and Donald McCabe, and Wente Construction Company (Wente Construction) for conspiring to rig bids on the electrical work for Unit II of the Spurlock Generating Station (Spurlock), a coal-fired electrical power plant in Maysville, Kentucky. The indictment charged a violation of section 1 of the Sherman Act, 15 U.S.C. § 1 (1982), and two counts of mail fraud, 18 U.S.C. § 1341 (1982). Wente Construction pled guilty; McCabe is awaiting trial. Only Lord Electric and Matthews are involved in this appeal.

The indictment alleged, and testimony before the grand jury tended to show, the following facts. In the week before the May 9, 1978 bid date on the Spurlock project, Matthews telephoned Robert Vandivender, than the director of a six-state regional division of The Howard P. Foley Company (the Foley Company) based in Richmond, Virginia. Vandivender was preparing to bid on Spurlock in a joint venture with Wente Construction. Matthews asked him to "support" Lord Electric's bid on the project, a euphemism that means to submit a higher bid than Lord Electric to insure that Lord Electric would get the contract. Vandivender agreed, in part because he believed Lord Electric had supported his division of the Foley Company in a 1976 project in Virginia called Union Camp. Vandivender said he would have to get consent from Wente Construction, however, and he spoke with Elton Arment, then president of Wente Construction. Arment than telephoned Matthews and the two agreed that in exchange for Wente Construction's "support," Lord Electric would pay Wente $50,000 to cover Wente's costs incurred in preparing the bid. This payment was agreed to allegedly because, unlike the Foley Company, Wente Construction had had no previous "favor" from Lord Electric. The $50,000 was later paid through two false invoices sent by Wente Construction to McCabe at Lord Electric.

After reaching this agreement with Arment, Matthews phoned Vandivender and gave him the figure that the Foley/Wente joint venture should bid. Vandivender testified that he had independent control of his regional division of the Foley Company and therefore he did not consult with his superiors when he decided to consent to Matthews' request. Lord Electric was awarded the contract on a bid of $9,176,000; the Foley Company and Wente Construction had originally been prepared to bid $7,840,000.

Lord Electric and Matthews moved to dismiss the indictment on double jeopardy grounds. One basis of the motion was that this alleged conspiracy is linked to another alleged conspiracy involving bid-rigging on three nuclear power plants in the

states of Washington and Indiana, of which the defendants had previously been tried and acquitted. Alternatively, they argued that the government's evidence shows that the Spurlock agreement was part of a larger "superconspiracy" to rig bids on electric projects across the country by the five largest electrical contractors in the nation, and, having already been tried for part of that superconspiracy, they cannot be indicted for another part. The motion was submitted on a voluminous documentary record to a magistrate who ruled that (1) the defendants had made a non-frivolous showing on their first theory, but that the Government had sufficiently rebutted it, and (2) the defendants had not made a non-frivolous showing on the superconspiracy theory, but, even if they had, it was rebutted. The district court adopted the magistrate's findings except that it ruled that a non-frivolous showing had been made on the second theory as well, entitling the defendants to an immediate review of the rejection of both theories. *See United States v. Abbey*, 431 U.S. 651, 662 (1977).

The defendants also appeal the court's refusal to grant access to certain transcripts from other grand juries, which they claim would be material in presenting their superconspiracy argument. Finally, the defendants argue that the magistrate erred in not granting them an evidentiary hearing on their motion to dismiss.

I

The double jeopardy clause of the fifth amendment prohibits multiple prosecutions for the same offense. Thus if the conspiracy charged in this case and the conspiracy of which the defendants were indicted and acquitted in another case were both part of a single agreement, this indictment is barred and must be dismissed. *See Braverman v. United States*, 317 U.S. 49, 54 (1942). The burden is on the defendant to show that a single conspiracy exists, but, because the government typically has better access to evidence, that burden is satisfied if the defendants advance a non-frivolous or prima facie showing of a single conspiracy. *United States v. Jabara*, 644 F.2d 574,

576-77 (6th Cir. 1981). The burden then shifts to the government to show separate conspiracies by a preponderance of the evidence. *Id.* In conspiracy prosecutions, the multiple/single conspiracy issue is determined by applying a "totality of the circumstances" test rather than the more limited "same evidence" test normally applied to double jeopardy reviews of substantive offenses. *Id.* at 577; *United States v. Sinito*, 723 F.2d 1250, 1256 (6th Cir. 1983). This test requires the trial court

> to consider the elements of: 1) time; 2) persons acting as co-conspirators; 3) the statutory offenses charged in the indictments; 4) the overt acts charged by the government or any other description of the offenses charged which indicates the nature and scope of the activity which the government sought to punish in each case; and 5) places where the events alleged as part of the conspiracy took place.

Sinito, 723 F.2d at 1256. The ultimate question is whether the evidence shows one agreement or more than one agreement. The finding of fact by the lower court that the government had proven by a preponderance of the evidence that multiple conspiracies existed can be set aside only if it is clearly erroneous. *Jabara*, 644 F.2d 577. The reviewing court is bound to accept this finding unless it "is left with the definite and firm conviction that a mistake has been committed." *Id.* (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364 (1958)).

A.

Theory I: Spurlock and the WPPSS Conspiracy

In 1983 defendants Lord Electric and Matthews were indicted, along with five other companies and their representatives, of conspiring to rig bids on three nuclear power plants in Washington and Indiana. The plants were the Washington Public Power Supply System (WPPSS) 1 & 4, WPPSS 3 & 5, both in Washington, and Marble Hill in Indiana. According to

the indictment in that case, the conspirators allocated the WPPSS 1 & 4 project to a joint venture of the Foley Company and Wismer & Becker Contracting Engineers on a bid price of $122 million. The bidding occurred on May 9, 1978, the same day as the Spurlock bidding. The Foley Company was represented in this conspiracy by its national president, Bancroft T. Foley, Jr.; Vandivender and the Richmond office of the Foley Company were not involved. WPPSS 3 & 5 was allegedly assigned to Fischbach and Moore, Inc., on a $151 million bid; the bidding took place in December 1978 and again in August 1979. L. K. Comstock and Company was originally to have joined Fischbach and Moore on this project but withdrew. The Marble Hill project was allegedly given to a joint venture of Lord Electric and Commonwealth Electric Company, but it was not until a third round of bidding (necessitated by job specification changes) that Lord/Commonwealth had the lowest bid and obtained the contract. The bidding occurred between June 1978 and January 1979; the award price was $98 million.

The agreement to divide these projects among the six companies allegedly arose at meetings among company executives in April and May of 1978 in Palm Springs and Long Beach, California. Matthews was present at each meeting. Testimony at trial, which was held in Montana, indicated that the rigging of the two WPPSS projects was specifically discussed at these meetings, but only one participant could recall that Marble Hill was mentioned and he could recall no agreement about it. There was no evidence that Spurlock was mentioned at the meetings. Testimony also showed that, as a result of Lord Electric's support of the Foley Company/Wismer & Becker bid on WPPSS 1 & 4, the Foley Company would owe Lord Electric an unspecified "favor." It was the government's theory in the Montana case that Marble Hill was the "favor" or *quid pro quo* for WPPSS 1 & 4.

In the present case, the defendants contend under their first theory that Spurlock was the *quid pro quo* for WPPSS 1 & 4. If this were true it would establish that the bid-riggings of both

projects were the products of one agreement. The evidence in support of the defendants' prima facie claim on this theory is circumstantial. They first attack the government's theory in the Montana trial that Marble Hill was the consideration for WPPSS 1 & 4. They point to the fact that only one Montana witness could recall that Marble Hill was discussed at the California meetings and none could say that an agreement was reached concerning that project. Further they note that Lord Electric did not emerge as low bidder on Marble Hill until the third round of bidding. These facts tend to show that Marble Hill was not rigged, or at least not as an exchange for WPPSS 1 & 4, thus opening the door for Spurlock to fit that bill. Second, the defendants assail the implication inherent in Vandivender's grand jury testimony that Lord Electric's support for the Foley Company on the Union Camp project was the reason Vandivender agreed to support Lord Electric on the Spurlock bidding. The defendants stated that they could offer evidence that Union Camp was in fact not rigged.

Even if both of these assertions were borne out it would not take the defendants' claim very far. The assertions establish no more than that Marble Hill was not the "favor" that the Foley Company owed to Lord Electric and that Spurlock could have served that function. If these were the only bases for the defendants' claim of a single conspiracy, we would not agree that the defendants had met their initial burden of putting forth a non-frivolous claim. The strength of the defendants' prima facie showing lies in other circumstances: Matthews allegedly knew that the Foley Company owed Lord Electric a favor as a result of the WPPSS 1 & 4 agreement at the California meeting; when Matthews was receiving from the Foley Company the price Lord Electric should bid on WPPSS 1 & 4, he was at the same time phoning Vandivender at the Foley Company to seek support for and arrange the Spurlock bidding; and WPPSS 1 & 4 and Spurlock were bid on the same day. These circumstances are sufficient to create a non-frivolous showing. We now turn to the *Sinito* factors to determine whether the court was correct in ruling that the government has

rebutted this showing by proving the existence of multiple conspiracies by a preponderance of the evidence.

The first *Sinito* factor, time, seems facially to work strongly against the government's case: the agreements and bidding on both the Spurlock and WPPSS 1 & 4 projects occurred at the same time. The importance of this factor in bid-rigging cases is somewhat diminished, however, for the conspirators cannot control the timing of their activities. Bids can be rigged only when bids are solicited by the victims. Therefore, the coincidence of these two agreements in time is as likely to be fortuitous as it is to be interdependent.

The second factor, overlap of conspirators, supports the government's position. On the corporate level there was significant overlap. Lord Electric and the Foley Company, by name, were involved in both agreements. Watson-Flagg Electric Company, a subsidiary of Fischbach and Moore, which had been "given" the WPPSS 3 & 5 project, bid on Spurlock. On the other hand, two other Spurlock bidders, Wente Construction and Sargent Electric Company, were not involved in the Montana case, while three Montana participants, Comstock, Commonwealth and Wismer & Becker, did not bid on Spurlock. On an individual level, however, the overlap is less significant. While Matthews at Lord Electric was directly involved in both agreements, he dealt with distinct individuals at the Foley Company. Bernard [*sic*; should read "Bancroft T."] Foley, the national president, was involved in the WPPSS 1 & 4 arrangements but not in the Spurlock transaction, and Vandivender, who was autonomously in charge of his regional division, made the agreement on Spurlock with Matthews without consulting other Foley company officials. There was no evidence that Vandivender was aware of the WPPSS 1 & 4 scheme. The other individuals involved in Spurlock, Wente Construction's Arment and Lord Electric's McCabe, were also not involved in WPPSS 1 & 4. Matthews, although a key player in both agreements, represents the only overlap among personnel to appear on the record, thus attenuating the circumstantial link between the two projects.

The third *Sinito* factor, the offenses charged, tends to show a single conspiracy because precisely the same statutory offenses—violations of section 1 of the Sherman Act—are alleged in each indictment.

We will skip ahead in this analysis to *Sinito* factor five, location. Like the time factor, the location of projects that are to be rigged is a fortuitous element not in the control of the conspirators. Thus, the fact that the WPPSS and Spurlock projects were in different regions of the country does not necessarily indicate separate schemes. On the other hand, it is noteworthy that, although the participants could not choose the venues of their schemes, the WPPSS 1 & 4 project in fact took place in a region over which Vandivender had no control or interest. Vandivender testified to the grand jury that he received a commission on work performed by his division of the Foley Company. WPPSS 1 & 4 could yield him no commission because it was not within his region, making it unlikely that he would relinquish a commission on Spurlock on account of the WPPSS 1 & 4 agreement.

The fourth factor, the nature and scope of the activities, is the most indicative of separate conspiracies. While both indictments alleged bid-rigging of electrical power plants, the two types of projects involved are vastly different in size and complexity. The winning bids in the Montana case ranged from $98-151 million, figures that dwarf the $9 million that Lord Electric received on the Spurlock contract. Further, the time and resources that the companies committed to performing the contracts in the Montana case, which involved nuclear power plants, would seem to have little in common with the amount and type of work required for the Spurlock coal-fired plant. Matthews had testified in the Montana case that the executives "discussed nuclear projects" at the California meetings and the problems that were "unique to large projects and especially unique to nuclear projects." A reasonable inference from these statements is that the major nuclear projects in the Montana case were distinct in scope and nature from the conventionally-powered Spurlock project.

In conclusion, our analysis of the five *Sinito* factors compels us to conclude that the lower court's finding that the Montana indictment and the indictment in this case allege separate conspiracies is not clearly erroneous and must be upheld.

B.

Theory II: the "Superconspiracy"

Lord Electric and the four other major electrical contractors in the nation have, among them, been the targets of at least six indictments across the country all alleging conspiracies to rig bids on large electrical contracting projects. The defendants contend that the government's allegations and evidence, if believed, show the existence of a single, broad conspiracy among these five industry leaders and that the separately indicted schemes are the by-products or results of this one "superconspiracy." They argue that the government has artificially carved up this broad conspiracy, and, as a result, the defendants have been twice indicted for the same offense.

The defendants' theory here differs from their first theory in one major respect. While their first argument proposed a horizontal link between the Spurlock agreement and the Montana conspiracy, they argue here that all of the indicted conspiracies are linked vertically to a common broader agreement. In other words, the defendants argue here that while the direct connection between WPPSS 1 & 4 and Spurlock may not be so close that the two were mutually dependent on each other, they are both issue of the same parent and that relationship is enough to invoke the protection of the double jeopardy clause.

In the proceedings below, the defendants relied primarily on *United States v. Beachner Construction Co.*, 729 F.2d 1278 (10th Cir. 1984), to meet their burden of showing a non-frivolous claim of double jeopardy. *Beachner* involved bid-rigging of highway construction projects in Kansas. The defendants there had been tried and acquitted on charges arising from the rigging of one such project and were subsequently indicted for the rigging of another set of projects elsewhere in the state. *Id.*

at 1279. The district court granted the defendants' motion to dismiss the second indictment on double jeopardy grounds on a finding that both indicted schemes "were each part of a single, continuing conspiracy which had existed in Kansas since the early 1960's." *Id.* In affirming the lower court, the court of appeals noted the presence of four factors that indicated the existence of a single, state-wide conspiracy. They were

> (1) the existence of common bid-rigging jargon prevalent industry-wide, (2) the participants had no fear of initiating the setup of a bid, (3) the perpetual nature of the bid-rigging scheme, and (4) the existence of a tacit mutual understanding among competitors of a single, continuing conspiracy.

Id. at 1282. The court drew this list of factors from *United States v. Consolidated Packaging*, 575 F.2d 117 (7th Cir. 1978), where the Seventh Circuit had noted the existence of similar circumstances in holding that an indictment for a nationwide conspiracy to fix prices in the cardboard container industry charged a single conspiracy, not multiple conspiracies, and thus the proof produced no prejudicial variance.

The magistrate in this case considered the four *Beachner* factors, found that they were not present, and ruled, therefore, that the defendants had failed to present a non-frivolous claim. The district court ruled otherwise, concluding without analysis that a non-frivolous showing had been made. We agree with the district court's implicit finding that, applying the *Beachner* factors, the defendants have made a non-frivolous showing of at least a tacit understanding among the major contractors that bid-rigging was an acceptable practice in the industry.

The district court went on to adopt the magistrate's alternate finding that the government had rebutted this prima facie case by showing that the nationwide superconspiracy did not in fact exist. This finding was based on an application of the *Sinito* factors to the superconspiracy claim. We do not believe, however, that the *Sinito* factors are useful to the final determination of whether this superconspiracy is or is not shown by

the evidence. The *Sinito* analysis is tailored to the task of comparing two indicted offenses, not to the detection of an unindicted broader agreement. We need not decide, however, whether the district court clearly erred in concluding that the superconspiracy did not exist, for we see a more fundamental error in the defendants' argument.

Even if we assume the existence of the nationwide conspiracy, and even if we further assume that both the Spurlock agreement and the Montana conspiracy are, in some sense, products of the superconspiracy, the question still remains whether this relationship establishes conclusively that the indicted lesser agreements are one offense for double jeopardy purposes. The *Beachner* court, faced with similar circumstances, assumed that it did without exposition. We believe that this assumption is invalid. In our view, the factual nature of the parent and offspring agreements, and of the relationship between them, must be considered to determine whether the offspring are independent of or dependent on the parent.

In some cases a parent conspiracy may appear to be an ongoing, active agreement. It may be characterized by a long-term agreement to maintain prices or limit production, by a centrally governed system of fixing prices, or by a periodic set of meetings at which industry-wide operations such as the assignment of major projects for the year are determined for the entire region covered by the conspiracy. In most cases the agreement will be expressed. A price-fixing cartel is perhaps the best example of this type of conspiracy. When such an active parent exists, the operative decisions are made at the parent level and the offspring conspiracies are merely implementations of the parent agreement. In these cases the offspring can be characterized as dependent on the parent and only one prosecution can be allowed. If a defendant is tried for the parent conspiracy or for any of the offspring agreements, it may not be indicted again.

In other cases, however, the parent agreement may be passive in nature. It may appear to be no more than an agreement

to agree, a willingness to enter into future illegal compacts, or an understanding—expressed or implied—that the participants will be receptive to requests that some future project be rigged or prices fixed. In this kind of case, the offspring agreements that actually bring those passive understandings into fruition are themselves full-blown, self-contained conspiracies, each of which may be subject to a separate indictment. They may have been facilitated or even encouraged by the existence of the parent agreement, but they are independent of it. The offspring conspiracies are distinct violations, and their common parentage is not enough to prevent their separate prosecution.

In this second class of cases, we think the government is put to an election. It may choose to prosecute the parent conspiracy, or it may charge the individual offspring separately, to the extent that, as here, the lesser conspiracies are not horizontally tied to one another. The government may not do both, however. The offspring agreements are distinct from each other, but the vertical relationship of each to the passive parent conspiracy cannot be denied. Thus, an indictment for the parent conspiracy sweeps within its terms the lesser active progeny and the latter cannot be tried again. Similarly, the trial of one offspring agreement is a trial on part of the passive parent, and the whole cannot be subsequently prosecuted.

A review of the record and the arguments of the defendants show that this is one of the second class of cases. Assuming, without deciding, that the superconspiracy that defendants describe exists, the evidence in the record shows beyond doubt that it was no more than a passive understanding that bid-rigging was an accepted way to do business. It was well known in the industry that the practice occurred, and the means and jargon employed in each agreement were often identical, but agreements to rig individual projects were made only when opportunities arose and, as our summaries of the Spurlock and Montana case transactions show, the arrangements had to be negotiated "from scratch" each time. While these negotiations were sometimes little more than an exchange of code words and figures, there is no evidence that the background under-

standing was the type of active, controlling super-agreement that would make Spurlock and the others predetermined executions of the general plan. The government has not indicted the nationwide superconspiracy; it has chosen instead to prosecute the lesser agreements individually. We hold that, in view of the nature of the nationwide conspiracy described by the defendants, the conspiracy charged in the indictment before us is, as a matter of law, not the "same offense" as the other offspring conspiracies for which the defendants have been tried or indicted and, therefore, this indictment should not be dismissed.

II

The defendants assert that the court erroneously denied their motion to compel the government to release to them the transcripts of a pending grand jury investigation. Release was sought under a pretrial stipulation that permitted the defendants access to "all grand jury transcripts material to the preparation of the defense." Specifically, the defendants maintain that these transcripts were material to the presentation of their superconspiracy double jeopardy argument. The magistrate viewed these documents *in camera* along with all other documents submitted by the parties and some additional transcripts requested by the magistrate before ruling on the double jeopardy motion. He concluded that the requested documents gave no support to the defendants' double jeopardy claims and, therefore, were not material to their defense. This finding removes the documents from the scope of the discovery stipulation and, therefore, the denial of the motion to compel was not in error. This does not mean that the magistrate's determination is unreviewable. The district court also examined the documents in dispute and affirmed the magistrate's ruling based on its own review. We find no error in the denial of the motion to require the government to release the defendants' transcripts of the pending grand jury investigation.

III

The defendants' final assertion of error is that they were wrongly denied an evidentiary hearing on their double jeopardy motion. The defendants correctly state the general rule: once a defendant has put forth a non-frivolous claim of double jeopardy, the court should hold an evidentiary hearing to resolve any factual disputes that arise. *Jabara*, 644 F.2d at 576; *United States v. Inmon*, 568 F.2d 326, 331 (3d Cir. 1977). In this case, voluminous documentary evidence, including grand jury transcripts and testimony from the trial of the Montana case, were submitted to the court and transferred to the magistrate for review and recommendation. The defendants, by letter, then requested both an oral argument and an evidentiary hearing on their motion. A hearing was held at which the merits of the motion were argued. Counsel for defendants did not then again request an evidentiary hearing or attempt to enter evidence, although counsel did state he had evidence to present on the issue of whether the Union Camp project was rigged. This hearing was held on October 30, 1984; the defendants made no further request for an evidentiary hearing, or inquiry about when one would be held, until after the magistrate's report was filed on July 2, 1985.

The defendants state that, given an opportunity, they would have presented testimonial evidence to show that the Marble Hill project was not rigged, to help resolve the conflict in the Montana trial testimony on whether Marble Hill was mentioned at the California meetings, and to rebut Vandivender's assertion before the Covington grand jury that the Union Camp project was rigged and served as the *quid pro quo* for the Spurlock agreement. As discussed above, however, *see supra* at 5-6 [4a-6a], these issues were only marginally relevant to the ultimate question of whether Spurlock was the *quid pro quo* from the Foley Company to Lord Electric for the WPPSS 1 & 4 project and findings in favor of the defendants on these issues would not have changed the outcome on their motion.

We do not condone the magistrate's failure to provide an evidentiary hearing, but the circumstances in this case do not warrant reversal on that ground. The defendants' failure to raise their request at the hearing before the magistrate, and for eight months thereafter, indicates that their desire to present live testimony was not as keenly felt then as it is now. The government was not opposing the request and both parties had ample opportunity to and did present extensive documentary evidence. Finally, the issues that defendants wished to contest at a hearing are not determinative, and we are satisfied that the defendants were not prejudiced by their inability to present them.

The order denying the defendants' motion to dismiss is AFFIRMED and the case is REMANDED for further proceedings.